87-792

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EDEN SERVICES, FRED J. EDEN, JR., and J. ERIK EDEN,
Petitioners,

v.

RYKO MANUFACTURING CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Through its "national accounts" program, a manufacturer dictated the prices to be charged by distributors to certain customers.

a. Whether, applying *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), a manufacturer and distributor who are independent business entities in an alleged agency relationship can "combine" to violate the Sherman Act's ban on vertical price-fixing.

b. Whether, under the holding in *Simpson v. Union Oil*, 377 U.S. 13 (1964), that formalities may not be used to cloak vertical price-fixing, the court of appeals could find that the distributors were agents of the manufacturer on national account sales and that such sales in substance occurred directly between the manufacturer and the purchasers.

2. Whether, in a "dual distribution" system in which the manufacturer is also a distributor in some areas, an exclusive territories agreement can be a *per se* violation of the Sherman Act as a horizontal allocation of markets.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Eden Services, Fred J. Eden, Jr. and J. Erik Eden hereby petition for issuance of a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit in *Ryko Manufacturing Co. v. Eden Services, et al.*, Nos. 86-1312 and 86-1393, issued on June 29, 1987.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A, at 1a-50a, *infra*) is reported at 823 F.2d 1215 (8th Cir. 1987). The district court decision denying motions for a directed verdict and for judgment n.o.v. (Pet. App. B, at 51a-59a, *infra*) is unreported.

JURISDICTION

The decision of the court of appeals was issued on June 29, 1987. A timely motion for rehearing and sug-

gestion for rehearing en banc was denied on August 17, 1987 (Pet. App. C, at 60a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

STATEMENT

This case concerns the distribution of "rollover" car wash machines which are most often installed in service stations. Respondent Ryko Manufacturing Co. ("Ryko"), based in Iowa, is the largest manufacturer of rollover car washes and the second largest car wash manufacturer. A rollover car wash costs between $20,000 and $40,000, depending upon the additional work required for installation.

1. *The Distributorship Contract And Eden*

Petitioner Eden Services ("Eden"), a Maryland partnership between Fred and Erik Eden, signed an exclusive distributorship contract with Ryko in May 1977 for Maryland and the Washington area. Section VI(B) of the contract, which was drafted by Ryko (Tr. 346), states that "this agreement does not constitute [Eden] the agent or legal representative of [Ryko] for any purposes whatsoever." Pet. App. D, at 67a.

As a distributor, Eden was responsible for promoting Ryko products, making sales, assisting in the design and layout of car wash locations, securing regulatory permits, installing machines, and performing warranty repairs and service. Tr. 1118; Ex. 10. In view of the high price of the equipment, a sale could take "years" of persistent sales effort by Eden. *Id.*

The distributor's role in providing service is critical. A car-wash purchaser who spends $25,000 on equipment ordinarily spends another $25,000 on service over the next four or five years, Tr. 148-49, and Eden provided first-rate service to Ryko purchasers. Tr. 901-02, 990, 1039.

Eden was obligated by contract to maintain liability, injury and property damage insurance, and to maintain an inventory of Ryko replacement parts. Pet. App. D., at 64a, §§ III(G), III(J). Eden also offered contracting and construction services in connection with car wash sales. Tr. 1129.

Because of local ordinances limiting the discharge of waste water, Eden initially could not sell car washes in many areas without water reclaim equipment. Ryko had no reclaim products or experience. Tr. 1430, 278. With Ryko's knowledge and encouragement, Eden developed its own reclaim system between 1977 and 1982, installing eleven such systems. Tr. 459-61, 1432-44. In late 1982, Ryko demanded that Eden stop selling its own reclaim and sell only the reclaim developed by Ryko in the interim. Ex. 76.

Eden also worked for years to develop sales and service opportunities in northern Virginia. Although Eden's contract did not cover northern Virginia, the Virginia distributor agreed that Eden could work that area cooperatively. Ex. 3; Ex. E, p. 10; Tr. 1510. After Ryko terminated the Virginia distributor and took over the state on a direct distribution basis in 1980, Eden closed additional sales in northern Virginia under cooperative arrangements with Ryko. Tr. 1137-43; Ex. P-9, 10. In late 1982, Ryko directed Eden not to make any more sales in Northern Virginia. Ex. 76.

2. *Ryko's National Accounts Program*

Most sales of Ryko equipment are made under the "national accounts" program, which provides to local

dealers of large companies (primarily oil companies) both extended credit terms and a discounted price dictated by Ryko. On other sales, called "retail" sales, Ryko provides a suggested retail price but the distributor may charge any price he wishes. On both retail and national account sales, Ryko receives the identical revenue. The distributor, however, absorbs the entire discount on national account sales, Tr. 408-09, and his installation fee for national account sales also is fixed by Ryko at less than half of the usual installation fee. Tr. 1410-11.

Ryko promotes its products to the headquarters offices of national account customers. Nevertheless, "in many respects" national account and retail sales are "identical," since the distributor "is responsible for promotion, planning, installation and servicing" for all Ryko equipment. Pet. App. A, at 5a. Many national account sales cannot be completed without an active sales effort by the distributor working with a service station dealer or a local official of a national account customer. *Id.* at 6; Tr. 2043, 744, 829; J.A. 369.

Eden devoted great effort to national account sales, Tr. 1117-18, 1132-33, 1436, and even developed a capital investment program for oil companies, Ex. A-5. A Ryko official noted that Eden had worked hard to develop national accounts such as Gulf, Crown Central, Jiffy Lube, Mobil, Shell and Amoco. Ex. E.

Many national account sales are completed on "purchase orders" issued by the national oil company in Ryko's name. On purchase order transactions, Ryko collects the purchase price and pays a "commission" to the distributor. For other national account sales and for all retail sales, the customer's order and payment go to the distributor, who pays Ryko by "sight draft" when the equipment is shipped. Eden completed national account sales on sight draft terms to Gulf, Amoco and Jiffy

Lube,[1] and Ryko issued official memoranda to distributors announcing that certain customers required sight draft procedures on national account sales. Pet. App. E.

3. *Ryko Terminates Eden As A Distributor, But Eden Wins The Trial*

Eden opposed Ryko's command in 1982 to stop selling its water reclaim system and to stay out of northern Virginia. The dispute came to a head in February 1983, when Eden competed directly against Ryko on a bid to the Crown Central service station in McLean, Virginia. Eden had worked on the Crown McLean location for years, submitting at least five different proposals for that site between 1979 and 1982. Ex. B-3, D-3, E-3, G-3, H-3.

Eden's final bid for Crown McLean defied Ryko in at least three respects: (i) Eden offered a $600 discount off the national account price fixed by Ryko; (ii) Eden attempted to sell in Ryko's exclusive Virginia territory; and (iii) Eden offered its own water reclaim. Ex. 21. Ryko executives testified that they viewed Eden's bid as a competitive threat which could undermine the national account price. Tr. 93, 263, 955-56 ("when one distributor goes below the national account price . . . pretty soon the Crown districts all over are going to demand that they also receive a $600 discount"). Within days, Ryko filed this lawsuit in the United States District Court for the Southern District of Iowa, seeking a declaration that Eden could be terminated as a Ryko distributor.

After Eden filed antitrust, contract and fraud counterclaims, Ryko terminated Eden's contract in December 1983. The District Court enjoined that termination in February 1984, and the court of appeals affirmed the injunction in relevant part. *Ryko Mfg. Co. v. Eden Services*, 759 F.2d 671 (8th Cir. 1985).

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[1] Ex. F-6, G-6, C-7, D-7, L-7, V-7, W-7, X-7.

The trial covered two weeks in October 1985, during which the jury heard the testimony of thirteen witnesses and reviewed several hundred exhibits. In response to eleven special interrogatories, the jury ruled in favor of Eden on all nine claims submitted to it, deciding:

1. That Ryko had engaged in vertical price-fixing through its national accounts program ($118,573);
2. That the exclusive territories agreement violated the Sherman Act by excluding Eden from Ryko's territory in northern Virginia ($41,822);
3. That Ryko's restriction on Eden's water reclaim sales was an illegal tie-in and also was exclusive dealing in violation of the Clayton Act, 15 U.S.C. § 14 ($87,434);
4. That Ryko breached its contract with Eden and committed fraud;
5. That Eden had neither breached its contract nor interfered with Ryko's business.

The jury awarded an additional $175,000 for lost future profits. The District Court reduced the tie-in award, denied Ryko's other post-trial motions and entered judgment after trebling of $1,126,785. Pet. App. B, at 58a.

4. *The Court of Appeals Reverses All Counterclaim Verdicts*

The Eighth Circuit reversed all of the antitrust verdicts and vacated and remanded Eden's contract and fraud verdicts. Judge Bowman's opinion for the court engaged in extensive appellate fact-finding, reversing jury verdicts on the basis of supposed facts that—at the very least—were squarely disputed at trial. Nevertheless, this Petition concentrates on the court's legal errors on the vertical price-fixing and exclusive territories claims.

(a) *Vertical Price-Fixing*—The court held that Ryko's national accounts program is not vertical price-fixing be-

cause either (i) Eden acted as Ryko's agent on national account sales and therefore the two companies could not "combine" to violate the Sherman Act, or (ii) a national account sale is really a "direct sale" between Ryko and the car wash purchaser. Under either description, the court wrote, "the analysis is essentially the same." *Id.*

In concluding that Eden was Ryko's agent on national account sales, the court overruled the verdict of the jury, which had been instructed on this point (Joint Appendix on appeal, at 552-53):

> Ryko claims that national account sales are really between Ryko and the Customer, so there is no illegal fixing of the distributor's price. Eden, however, argues that distributors actually make many national account sales and that customers purchasing equipment on national account terms are customers of the distributors. You must resolve this question based on the preponderance of the evidence.

The court insisted that under *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), it was not bound by the contract provision that Eden is not Ryko's agent "for any purposes whatsoever." Pet. App. D, at 67a § VI(B). The court held that it was free to characterize Eden as Ryko's agent "based on the substance of the economic relationship." Pet. App. A, at 14a.

The court decided that Eden did not act on national account sales as an independent business because it had no significant risk on those sales, whether they occurred by sight draft or purchase order. *Id.*, at 22a. On purchase order sales, the court wrote (*Id.*, at 16a):

> Eden never took possession of Ryko machines . . . nor did it bear any of the responsibility for billing the [national account] purchasers. Eden merely filed the purchase order with Ryko and received its commission after Ryko collected on the account.

On sight draft sales, the court complained that Eden still did not assume sufficient risks to be an independent busi-

ness. *Id.*, at 15a. The court, however, misunderstood or distorted the factual record in several critical respects.

First, the court found as a fact that national account sales are only those sales made on purchase orders. Pet. App. A, at 23a-26a. But many national account sales occur on sight draft terms, and Eden made eight such sales. *See* pp. 4-5, *supra*. Ryko directed in 1979 that national account sales to Jiffy Lube were to be "*prepaid or sight draft*," Pet. App. E, at 75a (emphasis added), and in 1985 described national account sales to Amoco in sight draft terms. *Id.*, at 69a-70a. *See* Tr. 1268 (distributors must quote national account price to customers designated as national accounts); Tr. 1603 (national account sales are not solely those sales made on credit terms of a purchase order transaction).[2]

Second, the court dismissed undisputed evidence of Eden's risks on sight-draft sales. On those sales, Eden took title to the machines before reselling them, billed and collected the purchase price from the customer, and once financed the entire transaction. *See* Ex. 4, 93, 97. In contrast, Ryko had no credit risk on sight draft sales.

Third, the court dismissed all evidence of Eden's other risks and entrepreneurial initiatives, which included developing an entirely new product—the water reclaim—to help make Ryko sales. On all sales, Eden absorbed the risk of damage during shipment, Ex. R-4, V-4, Tr. 1446-49, as well as the substantial risk that faulty equip-

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[2] The court misread the distributorship contract to "direct[] Eden to make NAP sales by soliciting customer purchase orders issued directly to Ryko." Pet. App. A, at 25a. The contract states that purchase orders from "major oil companies or national accounts headquarters" shall be in Ryko's name, § IV(H), Pet. App. D, at 66a, and that when a purchase order is issued the goods "will not be shipped on a sight draft." *Id.* Neither provision bars the use of a sight draft on national account sales when no purchase order is issued, which was expressly authorized by Ryko in the national account policy statements described in text above.

ment would require warranty repairs for which Eden received no payment. Pet. App. D, at 63a-64a, §§ II(D), III(I); Tr. 106. On purchase-order sales, the customer was not billed—and Eden was not paid—until after Eden had completed all of its work. Ex. M. Consequently, on a purchase order sale in 1983 Eden effectively extended credit for about $6,750. Ex. Q-9, 105. Moreover, if the national account prices set by Ryko did not leave enough to cover Eden's costs, Eden had to absorb the loss.

(b) *Exclusive Territories*—Ryko operates a "dual distribution" system, using distributors in some areas but operating direct distribution territories in California, Virginia, northern Florida, Ohio, New Jersey, New England, Missouri, and other areas. Tr. 480-86, 190-94. When Ryko set up its distribution system, it always intended to reserve territories for direct distribution by Ryko. Tr. 474.

Eden's contract prohibited sales outside of assigned territories, thereby protecting Ryko's Virginia territory from competition by Eden. Pet. App. D, at § I(A). Ryko filed this lawsuit shortly after Eden bid for Crown McLean below the national account price. Ex. 21; Tr. 263, 93.

The exclusive territories counterclaim was submitted to the jury on a rule of reason theory, and the court of appeals reversed on that ground, finding insufficient evidence of Ryko's market power. Although that factual ruling was erroneous,[3] this Petition emphasizes that the exclusive territories agreement is illegal *per se*. The court recognized that exclusive territories in a dual distribution system like Ryko's may be described as a "horizontal

[3] Ryko has a uniquely attractive product and is the second-largest car wash manufacturer with 10% of the market and unique market appeal. Pet. App. A, at 33a; *Compare Eiberger v. Sony Corp.*, 622 F.2d 1068 (2d Cir. 1980) (affirming liability for exclusive territories violation by manufacturer with 12% market share).

agreement[] among competing distributors." Pet. App. A, at 28a. The court declined to do so, however, stating that departures from the rule of reason are unusual and pointing to other decisions declining to apply the *per se* rule to such situations. *Id.*, at 29a.

SUMMARY OF ARGUMENT

1. Many national companies like Ryko use national accounts programs to market their goods. Until this case, however, the courts uniformly have condemned as resale price maintenance a manufacturer's attempts to dictate to a distributor the price charged to national account customers. The Eighth Circuit's reversal of the vertical price fixing verdict was based on two central errors.

a. The Eighth Circuit greatly expanded the ruling in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), when it held that Eden as Ryko's "agent" could not combine with Ryko to violate the Sherman Act. *Copperweld* concerned a parent company and its wholly owned subsidiary, holding that commonly-controlled entities with a "complete unity of interest" could not combine to violate the Sherman Act. The decision below stretches that holding to an agreement between a principal and his supposed agent (Eden), even though Eden was an entirely separate entity with very different interests. How could the two parties who have fought this lawsuit for four years be described as having a "complete unity of interest"? Several courts have ruled that principals and their agents may combine to violate the Sherman Act, and the Eighth Circuit's view to the contrary is erroneous.

b. Under *Simpson v. Union Oil*, 377 U.S. 13, 24 (1964), a manufacturer cannot use formalities or "clever draftmanship" to evade the Sherman Act's ban on vertical price fixing. Although invoking *Simpson*, the court of appeals fundamentally distorted that decision by holding that Eden, as Ryko's "agent," played no significant role

in those sales, which the court said occurred between Ryko and the purchaser.

The court of appeals thus fell into the error against which *Simpson* warned—mistaking commercial formalities for the substance of an economic relationship. The issue is whether Eden acted as an independent business or as a mere agent, or "order-taker." The Eighth Circuit's appellate fact-finding cannot conceal Eden's independence, entrepreneurial activity and risk-bearing. By unjustifiably expanding the category of distributors who may be called agents "for antitrust purposes," Pet. App. A, at 12a, the decision below undermines *Simpson* and the rule against vertical price-fixing.

In any chain of distribution, it is possible through market devices such as consignments and national accounts programs to make truly independent wholesalers or retailers resemble agents of the manufacturer. By conferring immunity from the Sherman Act for such a device, the court of appeals contravened this Court's holdings and created a broad gap in the *per se* rule against vertical price-fixing. This case should be reviewed to ensure that the lower courts do not thwart that rule through the facile analyses applied in this case.[4]

2. If Ryko's exclusive territories policy had been established through an agreement among independent distributors, it would have been recognized as a horizontal restriction and *per se* illegal under the Sherman Act. The *per se* rule should apply here, as well. Ryko operates as a distributor in numerous territories such as Virginia. By reaching exclusive territories agreements with other distributors, Ryko arranged a horizontal market allocation which Ryko as manufacturer enforced. As this

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[4] The vertical price-fixing questions raised in this Petition are distinct from the question presented in *Business Electronics Corp. v. Sharp Electronics Corp.*, No. 85-1910, which concerns whether price-fixing may be found in the absence of agreement on specific price levels.

Court ruled in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), when a manufacturer also operates as a distributor, agreements between the manufacturer/distributor and other distributors are horizontal agreements.

I. The Decision Below Undermines The Policy Against Vertical Price-Fixing Through National Accounts Programs

In every reported case considering resale price maintenance through a national accounts program, the courts have ruled that manufacturers cannot use a national accounts program to circumvent the *per se* rule against vertical price-fixing. *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983); *Freed Oil Co. v. Quaker State Oil Refining Co.*, 419 F. Supp. 479, 491 (W.D. Pa. 1976), *vacated per stipulation*, 1977-2 Trade Cas. (CCH), ¶ 61,758 (W.D. Pa. 1977); *Capital Temporaries of Hartford, Inc. v. Olsten Corp.*, 383 F.Supp. 902 (D. Conn. 1974); *United States v. White Motor Co.*, 194 F.Supp. 562, 576 (N.D. Ohio 1961), *remanded on other grounds*, 372 U.S. 253, 260 (1963).

In approving Ryko's vertical price-fixing program, the Eighth Circuit seriously distorted this Court's rulings in *Simpson* and in *Copperweld*. Because these issues have recurred in recent years,[5] and because the Eighth Circuit's decision undermines the national policy against ver-

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[5] *E.g., Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722 (7th Cir. 1986); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986); *Tunis Brothers Co. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985), *vacated and remanded*, 106 S.Ct. 1509 (1986), *reaffirmed in pertinent part on remand*, 823 F.2d 49 (3d Cir. 1987); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979).

tical price-fixing, this Court should review this case to address the *Copperweld* and *Simpson* issues.

A. Under *Copperweld* and the Sherman Act, "Agents" Have The Capacity To Conspire With Their "Principals"

The court of appeals, based on its ruling in *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313 (8th Cir. 1986), held that Ryko was incapable of conspiring with its "agents" under the antitrust laws. *Pink Supply* held that a manufacturer was not legally capable of conspiring with its sales representatives, even though they were separately incorporated. The Court stated that the same "inherent unity of economic interest and purpose" that compelled this Court's decision in *Copperweld* "precludes a finding of conspiracy between a corporation and certain agents." 788 F.2d at 1316.

But this Court expressly limited the holding in *Copperweld* to wholly owned subsidiaries.

> We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

Copperweld, 467 U.S. at 767. *Copperweld*'s rationale cannot reach Ryko and its distributors, which are distinct business entities whose interests often are adverse to Ryko's.

For example, Ryko repeatedly attempted to modify its contract with Eden, but Eden rejected the proposed modification each time. Tr. 1162-70; Ex. L-1. By 1982, Ryko ordered Eden to stay out of northern Virginia and to stop selling its own reclaim system, but Eden defied Ryko, which ultimately led to this lawsuit. The holding that these separately owned and conflicting companies had the

same "unity of interest" as a parent company and its wholly owned subsidiary stretches *Copperweld* beyond recognition.

The court's holding on this point conflicts with *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986) (Easterbrook, J.), which held that an airline and its agents "are not the same firm for purposes of *Copperweld*" and that collaboration among them "therefore might establish a *per se* violation." Similarly, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 107 S.Ct. 880 (1987), held that agreement between a moving company and its agents—who were legally separate corporations but who sat on the moving company's board of directors—were capable of combining in violation of the Sherman Act. *See Albrecht v. Herald Co.*, 390 U.S. 145, 150 (1968) (combination between newspaper and agent). This Court should resolve the conflicting decisions on this point.

B. Under *Simpson*, Formalities Cannot Insulate Vertical Price-Fixing From The Sherman Act

United States v. General Electric Co., 272 U.S. 476 (1926), found no violation of the Sherman Act when General Electric used a consignment device to control the prices charged by distributors to consumers.[6] That decision effectively was overruled by *Simpson*, which involved Union Oil's consignment system for providing gasoline to service stations. Union paid all property taxes on the gasoline and retained title until the retail sales were completed. This Court ruled that Union could not dictate the price charged by the service stations, using the consignment device as a "cloak" for resale price maintenance. 377 U.S. at 18. Even though Union retained title

[6] Under a consignment, the manufacturer retains title and ownership of the goods while they are in the distributor's possession, so the sale nominally occurs between the manufacturer and purchaser.

to the gasoline until it was sold to motorists, the stations had "all or most of the indicia of entrepreneurs" and faced the "risk of loss" while the gasoline was in their possession. *Id.* at 20. Union's argument, the Court held, would circumvent the Sherman Act "merely by clever manipulation of words, not by differences in substance." *Id.* at 22.

The Fifth Circuit applied *Simpson* to the national accounts program in *Greene v. General Foods.* The distributor in that case took title to the coffee he resold, but was restricted in the price he could charge to national account customers. General Foods handled collections from national account customers and assumed the risk of customer default. 517 F.2d at 641. The Fifth Circuit ruled the program a "per se price-fixing violation." *Id.* at 658.

The Fourth Circuit in *Bostick Oil Co. v. Michelin Tire Corp.* also followed *Simpson*'s analysis. Large-volume purchasers designated as "national accounts" "were billed and their accounts collected centrally through Michelin, while distributors such as Bostick continued to perform the actual selling and delivery of tires." 702 F.2d at 1212. Notably, Bostick did not take possession of the tires, but "employed the practice of 'drop-shipping,' *i.e.*, transferring the tires to the purchaser by taking an order and having tires shipped directly" to the customer. *Id.* at 1210. The Fourth Circuit held that if the national account program was mandatory, it constituted illegal resale price maintenance. *Id.* at 1217-18.

In this case, however, the court of appeals turned *Simpson* on its head, announcing at the outset that *Simpson* "did not overrule *General Electric*," Pet. App. A, at 13a, even though the leading antitrust treatise concludes in no uncertain terms, "In Simpson's suit for treble damages, the Supreme Court overruled *General Electric.*" 7 P. Areeda, Antitrust Law, ¶ 1473c, p. 308 (1985); *see Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1436

(7th Cir. 1986). From this doubtful beginning, the court of appeals pursued a misguided analysis of the risks borne by Eden and Ryko on national account sales. *See* pp. 7-9, *supra*.

The court highlighted three supposedly critical factors: (i) that Eden did not warehouse the (extremely large) car wash machines, which were shipped directly to both retail and national account customers; (ii) that Eden did not extend credit to the national account customers; and (iii) that Ryko performed the billing and collection on purchase-order sales. Pet. App. A, at 16a-17a, 21a-22a. But each of these elements was present in *Greene* or *Bostick Oil* and was not found to establish that national account sales occurred directly between the manufacturer and the purchaser. *See Greene*, *supra*, at 641 (General Foods extended credit and performed all collection on national account sales); *Bostick Oil*, *supra*, at 1212 (goods shipped directly to customer and Michelin conducted all billing and collection).

Moreover, the court overturned the jury verdict without giving any weight to the extensive showing of Eden's risks on national account sales or to the contract provision stating that Eden is not Ryko's agent. *See* pp. 2-3, 7-9, *supra*.[7] Bearing the risk for financing on sight-draft

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[7] The opinion below reflects a one-sidedness that is especially inappropriate in an appeal of a jury verdict, when only evidence supporting the verdict should be considered and Eden should receive the benefit of all reasonable inferences drawn from that evidence. *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944). Thus, the opinion stressed that Eden never took title to machines sold by purchase order, Pet. App. B, at 16, but conversely found it entirely insignificant that Eden did take title in national account sales made on a sight-draft basis. *Id.*, at 20. The court erroneously described Eden's investment in its business as only $500 worth of spare parts, or not enough to establish Eden's independent business identity. *Id.*, at 19. But in 1983 Eden had $7,350 of spare parts in inventory plus almost $40,000 invested in machinery and other assets. Ex. N-9.

sales, for warranty service, and for shipping damage, Eden was no mere sales agent. *See* pp. 8-9, *supra*. Eden also bore the risk of loss if Ryko set the national account price too low to cover Eden's costs. *See Simpson*, at 20 (service station's return controlled by prices set by Union Oil). Moreover, Eden aggressively developed its water reclaim system and construction expertise to support the sale of Ryko equipment. As an active market participant, Eden set its own prices on retail sales to meet market conditions, Tr. 1268-72, but was denied that power by Ryko on national account sales. *Compare Morrison*, *supra*, at 1437 (plaintiff "is just an order taker"); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1336 (9th Cir. 1983) (same).

At bottom, the court failed to appreciate the central lesson of *Simpson*: that a supplier may not use a formality such as consignment or a national accounts program to restrict the power to set prices of "wholly independent businessmen" in the distribution chain. As the Fifth Circuit wrote in *Greene*, "This concern for the autonomy of independents grows in part from the view that competition at all levels of the distributive process is desirable and in part from the view that a manufacturer utilizing independent distributors and investing them with substantially all the risks of wholesale and retail distribution must also invest them with the signal prerogative of the independent businessman—the power to set his own price." 517 F.2d at 656.[8]

The court of appeals essentially reversed the antitrust enforcement policy articulated in *Simpson* and *Greene*.

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[8] This point is reinforced in the antitrust law of the European Economic Community, which distinguishes between distribution agents—who are subject to greater control by the manufacturer —and indepenent dealers. A dealer is independent if he "assumes any of the risks involved in a transaction," such as "if he maintains a substantial stock as his own property, *or provides free service to his customers*, or can set prices." 7 P. Areeda, *supra*, ¶ 1473 p. 317 (emphasis added).

In order to restore the service station dealer's power to set price, *Simpson* disregarded the consignment provision imposed by the manufacturer. In order to deny Eden the power to set price, the court below disregarded the contract provision—drafted by Ryko—that Eden was *not* an agent of Ryko. Ryko gets the best of all possible worlds: no agency under the contract it drafted, but "agency" for the purpose of its antitrust defense.

The issue here is not whether Ryko may have a national accounts program, but whether it can use that device to dictate distributors' pricing. As this Court wrote in *United States v. General Motors*, 384 U.S. 127, 146 (1966), *per se* antitrust violations are "not to be saved by reference to the needs for preserving the collaborators' profit margins or their system for distributing the [product]."

The court of appeals' opinion reflects a more general confusion about the correct application of *Simpson*. *Compare Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983) (*Simpson* does not apply to vertical fixing of wholesale prices), *with Morrison*, *supra* (under *Simpson* subjective intent of manufacturer is controlling on agency issue); *with* 7 P. Areeda, *supra*, at 318 ("*General Electric* was wrong to make 'agency' or 'consignment' . . . determinative"). Plenary review by this Court is justified to resolve this confusion and the conflicting rulings on whether national account programs involve vertical price fixing.

II. The Exclusive Territories Agreement Was A Horizontal Market Allocation And Must Be Illegal *Per Se*

Ryko entered into horizontal agreements with its fellow Ryko distributors to allocate geographic markets, some of which—like Virginia—Ryko took for itself. In addition to excluding Eden from its Virginia territory, Ryko excluded the Atlanta distributors from its exclusive

territory in northern Florida, Tr. 497, and traded exclusive territories with other distributors. Tr. 496-97; Ex. P-2. In each instance, Ryko achieved horizontal restrictions while acting as a distributor, and that horizontal market allocation must be illegal *per se*. *See United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972). ("One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition").

A number of decisions have held that when a manufacturer operates a dual distribution system like Ryko's —with direct distribution outlets in some areas and distributors in others—territorial restrictions are primarily horizontal and illegal per se.[9] More recent decisions—influenced by *Contintental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)—have tended to agree with the Eighth Circuit that such arrangements are primarily vertical and thus not per se illegal.[10] But in approving

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[9] *See Dougherty v. Continental Oil Co.*, 579 F.2d 954 (5th Cir. 1978), *vacated on other grounds*, 591 F.2d 1206 (5th Cir. 1979); *Pitchford v. Pepi, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir. 1973); *Crime Check and Communications Corp. of America v. Novar Electronics Corp.*, No. HM 75-1680 (D. Md. filed Sept. 19, 1978); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y.), *aff'd on other grounds*, 417 F.2d 621 (2d Cir. 1969); *Guild Wineries & Distilleries v. J. Sosnick & Son*, 102 Cal. App. 3d 627, 162 Cal. Rptr. 87 (Ct. App. 1980).

[10] *See Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 (9th Cir. 1986), *modified on other grounds*, 810 F.2d 1517 (9th Cir. 1987); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1201-02 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984); *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 663 F.2d 405, 409-11 (2d Cir. 1981); *Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422, 425-28 (5th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981).

a rule of reason analysis for vertical territorial restraints, *Continental T.V.* did not address the dual distribution context present here. Moreover, no court has considered the impact on this issue of *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

McKesson, a manufacturer, operated at the wholesale level itself and also sold products to independent wholesalers who agreed to resell at specific prices. McKesson argued that its relationship to wholesalers was vertical and therefore was protected by the since-repealed "fair trade" laws. This Court flatly rejected that argument (351 U.S. at 312) (emphasis added):

> [McKesson] is admittedly a wholesaler with resale price maintenance contracts with 94 other wholesalers who are in competition with it . . . . *Yet it urges that what would be illegal if done between competing independent wholesalers becomes legal if done between an independent wholesaler and a competing wholesaler who is also the manufacturer of the brand product.* This is so, [McKesson] maintains, because in contracting with independent wholesalers it acted solely as a manufacturer selling to buyers rather than as a competitor of these buyers. *But the statutes provide no basis for sanctioning the fiction of McKesson, the country's largest drug wholesaler, acting only as a manufacturer when it concludes 'fair trade' agreements with competing wholesalers. These were agreements "between wholesalers."*

Just as the Supreme Court rejected the "fiction" that McKesson acted "only as a manufacturer" in dealing with independent wholesalers, this Court should reject the fiction that Ryko acts only as a manufacturer when it agrees with other distributors to have exclusive territories.

Ryko and the Edens were competing against each other in northern Virginia. Both tried to sell car wash machines to the Jiffy Lube station in Alexandria. Tr. 986-990. Both tried to sell to Crown for the McLean service

station. That competition was having the impact predicted by Adam Smith: Eden was cutting prices. Ryko enforced the exclusive territories provision to stop Eden's price-cutting and preserve Ryko's vertical price-fixing system.

In this case, there is no basis for the inference that the manufacturer's subjective intent derived from a benign desire to build a strong distribution network. *E.g., Davis-Watkins, supra,* 686 F.2d at 1201. Ryko moved against Eden to protect Ryko's national account prices and its exclusive Virginia territory from Eden's competition. In *Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332, 351 (1982) (footnote omitted), this Court explained that the mere possibility that a horizontal agreement may have redeeming virtues does not prevent application of the *per se* rule.

> The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.

Because this Court has never addressed the application of the *per se* rule to vertical restraints in a dual distribution system, it should grant certiorari on this question.

CONCLUSION

For all of the foregoing reasons, this Court should grant this Petition to review the questions raised herein.

Respectfully submitted,

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Date: November 16, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1312

RYKO MANUFACTURING CO.,
Appellant,

v.

EDEN SERVICES, a Maryland Partnership,
FRED J. EDEN, JR. and J. ERIK EDEN,
Appellees,

and

EDEN SERVICES, FRED J. EDEN, JR. and J. ERIK EDEN,
Appellees,

v.

RYKO MANUFACTURING CO.,
Appellant.

No. 86-1393

RYKO MANUFACTURING CO.,
Appellee,

v.

EDEN SERVICES, a Maryland Partnership,
FRED J. EDEN and J. ERIK EDEN,
Appellants,

and

EDEN SERVICES, FRED J. EDEN, JR. and J. ERIK EDEN,
Appellants,

v.

RYKO MANUFACTURING CO.,
Appellee.

Appeal from the United States District Court
for the Southern District of Iowa

Submitted: November 13, 1986

Filed: June 29, 1987

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

BOWMAN, Circuit Judge.

Ryko Manufacturing Company (Ryko) appeals from the District Court's denial of its motions for directed verdict, judgment notwithstanding the verdict, and a new trial, following a jury trial of various claims stemming from a dispute with one of its distributors, Eden Services (Eden). Ryko initiated this lawsuit, seeking a declaratory judgment that Eden had breached the terms of its distributorship contract with Ryko. Eden counterclaimed, charging Ryko with federal antitrust and racketeering violations, breach of contract, and common law fraud. Eden later dropped its racketeering claim, but after a protracted trial, the jury returned verdicts for Eden on the antitrust, contract, and fraud claims. The jury

awarded Eden damages only on the antitrust claims, which, when trebled, totalled approximately $1.1 million. Ryko challenges each of the verdicts, arguing that Eden has not produced evidence sufficient to support any of its claims. Alternatively, Ryko challenges the District Court's rulings on evidentiary matters pertaining to the computation of damages with respect to Eden's antitrust claims.

FACTUAL BACKGROUND

Ryko is a manufacturer of automatic car-wash equipment. Ryko markets its products nationally, both through a network of distributors and by direct sales to larger purchasers such as major oil companies arranging for the purchase of car-wash equipment for their affiliated stations. In the past Ryko has granted its distributors exclusive geographic territories and has prohibited the distributors from selling competitive car-wash equipment. Although the newer contracts contain less restrictive provisions, Eden's distributorship contract includes the earlier, more restrictive provisions. The distributors are responsible for promoting and soliciting sales of Ryko equipment and for performing installation, maintenance, and repair work on machines sold in their exclusive territories. In some areas, Ryko is a direct distributor and subcontracts the installation, maintenance, and repair work.

Sales of car-wash units are made in two ways, by sight draft and by purchase order. In sight-draft sales, the distributor takes an order for the equipment from the purchaser and forwards the purchase order to Ryko along with a downpayment on the machine. Ryko then builds the equipment as ordered, and ships the equipment to a location specified on the distributor's purchase order. Before the equipment is unloaded at its destination, Ryko requires confirmation that the distributor's sight draft, which guarantees payment for the equipment, has been honored. In all material respects, these sales are thus the

equivalent of cash transactions. Ryko provides its distributors with suggested retail prices for its equipment, but the distributors are free to charge whatever the market will bear when selling by sight draft to independent buyers unaffiliated with any of the major oil companies or other major buyers.

For sales by purchase order, Ryko requires no downpayment. The customer issues a purchase order in its own name payable directly to Ryko, and this documentation is intended to exclude the distributor as an intermediate payor or payee. Ryko then ships the equipment to the customer and arranges for its installation by a distributor, without requiring immediate payment.

Sales to larger customers generally are made by purchase order through Ryko's National Account Program (NAP). Under the NAP, designated customers, most commonly major oil companies and other multiple purchasers of car-wash equipment, receive significant volume discounts from the prices that Ryko recommends its distributors charge on individual sales for the distributor's own account. Ryko's contracts with its distributors specify that Ryko retains sole control over pricing and other marketing decisions regarding the NAP.

Although the qualifications for NAP customer status are not entirely clear, Ryko appears to focus its NAP program on those customers who are likely to purchase a large number of car-wash machines and whose buying decisions are handled, at least initially, in some centralized manner. For example, the oil companies generally participate in the purchase of car-wash equipment by their affiliated service stations. In many cases, prior approval of the equipment by the oil company is necessary because the oil company is assisting the station owner or jobber with financing for the machines. Even where financial assistance from the oil company is not required, lease obligations or other contractual arrangements may require such approval before installation of equipment at

a particular service station. Accordingly, very few of the individual station operators or jobbers affiliated with the major oil companies are likely to purchase equipment unless it first has been approved by central management. The oil companies naturally seek to use their potential for purchasing large quantities of machines, even if purchased one at a time, to demand the best possible prices and service arrangements from their equipment suppliers. Moreover, the oil companies generally expect to receive a single discounted price for equipmnt to be installed at any location throughout the country. Joint Appendix (J.A.) 359; Trial Exhibits (Ex.) 23, 72, 81, 83, 87, 88, B-2, I-3.

In many respects, sales by the distributors and NAP sales are identical. The distributor often is involved in the NAP sale and frequently is responsible for promotion, planning, installation, and servicing of equipment sold to NAP customers. However, Ryko corporate sales personnel are involved to a greater degree in NAP sales than in the distributors' sales to non-NAP customers. Ryko makes sales presentations to oil company procurement personnel, arranges for installation of Ryko equipment on a trial-use basis, and negotiates volume discounts with the customers in an effort to receive the required oil company approvals for its equipment. Ryko's factory representatives maintain continuing contact with the NAP customers' national or regional headquarters, further promoting the products and monitoring customer satisfaction with the equipment and services.

Although some companies issue orders for multiple machines based on these national presentations, the distributors' promotional efforts can be essential to the completion of individual NAP sales. The distributors make primary contact with (1) individual station owners affiliated with the major oil companies; (2) oil industry middlemen, known as "jobbers," who typically own a number of affiliated stations; and (3) middle level or district managers of the oil companies with direct re-

sponsibility for retailing operations within the distributors' areas. While an oil company might designate Ryko an approved equipment supplier as the result of a national sales presentation, many NAP sales cannot be completed until the distributor has convinced the local purchaser that installing Ryko car-wash equipment at his location is a profitable idea.

Nevertheless, there are important differences between NAP sales and other sales by the distributors. First, as noted above, the prices at which NAP sales are made are set by Ryko. In making a sales presentation under the NAP, the distributor is obliged to offer equipment at the NAP price. Sales by the distributors for their own accounts are not similarly restricted. Second, the method of payment differs. In the case of NAP sales, Ryko extends credit to the customer, shipping and arranging for installation of the goods solely on the basis of the customer's purchase order. On other sales, Ryko requires its distributors to issue sight drafts guaranteeing immediate payment for the machines. Third, the method of compensating the distributors differs. On sight-draft sales, the distributor receives payment directly from the customer, and earns a gross profit equal to the difference between the retail price he charges the customer and the wholesale price Ryko charges the distributor for the machine. On NAP sales, Ryko pays the distributors a commission for each machine sold in the distributor's exclusive territory. The Commission on NAP sales is the difference between the NAP price to the customer and the wholesale price the distributor would have paid if purchasing the machine for its own account. Finally, the documentation for the transactions differs. The same purchase order forms, which bear Ryko's logo and billing address, are used in both sight-draft and NAP sales. However, the distributors are required by their contracts with Ryko to issue purchase orders for NAP sales in the name of the NAP customer; on sales for the distributor's own account, the orders are issued in the distributor's name.

Eden became a Ryko distributor in the summer of 1977 and was assigned in the distributorship contract an exclusive territory covering Maryland and the District of Columbia. Ryko recently had assigned all the Virginia to another distributor, but Eden repeatedly expressed a desire to distribute Ryko's products in the northern Virginia area near Washington, D.C. The precise nature of Ryko's assurances to Eden on this issue are a subject of sharp dispute between the parties. However, it is clear that Eden reached an agreement with the Virginia distributor regarding a division of commissions on sales in northern Virginia and that Eden actively promoted and sold Ryko's products there.

In 1980, Ryko terminated its Virginia distributor, and again the issue of Eden's territory arose. Eden claims that a Ryko factory representative assured it that its agreement with the former Virginia distributor would be honored; Ryko claims that the agreement allowed Eden to perform services in Virginia only on an "as needed" basis for Ryko. The dispute over Eden's territory and commissions continued into 1982, and business relations became increasingly strained. In April 1982 the parties met and came to an agreement regarding Eden's rights in northern Virginia, but both parties agree that the agreement was not adhered to. Whether the agreement effectively modified the distributorship contract and whether one or both of the parties breached the modified agreement are disputed. Following the April meeting, relations continued to deteriorate. Eden accused Ryko of unilaterally depriving the distributors of their customers by adopting a new "special usage" account as part of the NAP. Eden shared its views with other Ryko distributors, and Ryko accused Eden of taking a "cheap shot" at Ryko.

In October 1982, Ryko informed Eden that it was returning to the literal terms of the 1977 contract, since Eden had refused to sign the new distributorship contracts offered in 1980 and 1982 and since, in Ryko's

view, Eden had not adhered to the terms of the April 1982 agreement. Under Ryko's interpretation of the 1977 contract, Eden categorically was barred from distributing Ryko products in Virginia and was subject to a pricing structure that differed from the other distributors, who operated under newer contracts with different pricing provisions. Ryko also read the contract to prohibit Eden from selling a water reclaim device (used to recycle water used in car-wash systems) developed by Eden, and directed Eden to sell only Ryko water reclaim units.

Eden wrote letters to Ryko in December 1982 and January 1983 accusing Ryko of harassing Eden, of taking over its territories, and of interfering in Eden's business relationships. Eden asserted it right to sell in Virginia as it saw fit and threatened legal action against Ryko if necessary. Both parties continued to make demands of the other regarding proposed contract changes, but by this time communication had become more conducive to litigation than to resolving a business dispute.

Following Eden's February 1983 bid to Crown McClean, a Virginia customer Eden had pursued for several years, Ryko brought its declaratory judgment action in District Court, which prompted Eden's extensive counterclaims. In December 1983 Ryko attempted to terminate Eden, citing alleged interference with Ryko's contractual relationships with both its customers and its distributors and Eden's alleged sale of competing products in violation of the exclusive dealing provision of the distributorship agreement. Eden sought and received an injunction against the termination and an order defining its rights in northern Virginia. Ryko appealed the order, and this Court modified the injunction in April 1985. *Ryko Mfg. v. Eden Services*, 759 F.2d 671 (8th Cir. 1985). The subsequent District Court trial on Eden's various common law antitrust counterclaims resulted in multiple verdicts and a substantial damages award for Eden. Ryko

made motions for a new trial and for judgment notwithstanding the verdict, which the District Court denied in most substantive respects.[1] Final judgment having been entered in favor of Eden, Ryko appeals the District Court's ruling on its post-trial motions, and the parties are again before us. Ryko contends that there is insufficient evidence to support any of the jury verdicts and, accordingly, that the District Court erred in denying its motion for judgment notwithstanding the verdict. Alternatively, Ryko argues that the verdicts are against the weight of the evidence, and that the District Court erred in denying its motion for a new trial.

STANDARDS OF REVIEW

When reviewing a district court's ruling on a motion for judgment notwithstanding the verdict, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the nonmoving party. *Pumps & Power Co. v. Southern States Industries*, 787 F.2d 1252, 1258 (8th Cir. 1986). This requires us to

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tends to prove, (3) give the nonmovant the benefit of all reasonable inferences and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

McCabe's Furniture v. La-Z-Boy Chair Co., 798 F.2d 323, 327 (8th Cir. 1986).

Our review of a district court's denial of a motion for a new trial is even more limited. The denial of a

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[1] The jury appeared to have derived one of the damage awards from the wrong damages exhibit, and the District Court reduced this award to reflect the correct amount. Eden did not resist Ryko's j.no.v. motion with respect to the attempted monopolization claim. J.A. 799.

motion for a new trial is within the sound discretion of the trial court, and its ruling will be reversed only upon a showing that the court abused its discretion. *Greenwood v. Dittmer*, 776 F.2d 785, 790 (8th Cir. 1985); *see also Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1221 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986). We have thoroughly examined the extensive record, and we apply these standards, as appropriate, to each of the verdicts rendered against Ryko.

ANTITRUST: Resale Price Maintenance

Ryko's first argument on appeal is that the evidence was insufficient to submit Eden's resale price maintenance claim to a jury. Resale price maintenance, a form of vertical price fixing by which a seller of goods attempts to set the price at which his buyer resells the goods to a second buyer, has been condemned as inevitably tending to have a pernicious effect on competition. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982). As a result, resale price maintenance is subject to a rule of *per se* illegality under Section 1 of the Sherman Act, 15 U.S.C. § 1. *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 51 n. 18 (1977). Schemes to fix both minimum, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and maximum resale prices, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), are subject to the rule, and no evidence of anticompetitive impact is required to prove a violation. Despite criticism regarding the theoretical justification for the *per se* treatment of vertical price restrictions, *see, e.g., Sylvania*, 433 U.S. at 69-70 (White, J., concurring in judgment); Bork, *The Antitrust Paradox* 282-98 (1978), the Supreme Court recently has declined to reconsider the wisdom of the rule as it applies to resale price maintenance. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984).

It follows that if, as Eden claims, Ryko's NAP is a resale price maintenance scheme, we would not be free to consider its actual effect on interbrand competition. However, we hold that Eden's evidence in this case is insufficient as a matter of law to establish that the NAP constitutes resale price maintenance.

Ryko designed the NAP to operate within its existing framework of independent distributors, because it had neither the desire nor the capital to establish a vertically integrated distribution network on a national scale. It is undisputed that without a comprehensive national sales approach, including standardized price quotations, Ryko would find it difficult, if not impossible, to obtain the required oil company approvals of its equipment. If the pricing system and purchasing mechanisms of Ryko's NAP are held to constitute resale price maintenance, the practical effect of such a holding will be to require direct distribution of car-wash equipment sold to major oil companies. This would pose a potentially insurmountable barrier—in terms of the required capital and labor—to the entry of new competitors. Such a result hardly would be consistent with sound antitrust policy.

As observed recently by the Seventh Circuit, "[i]t is not the law that if someone hires a real estate broker to sell his house for $100,000 he and the broker have made an agreement to fix the resale price of the house and are therefore guilty of a per se violation of the Sherman Act . . . ." *Morrison*, 797 F.2d at 1436. Whether expressed in terms of an agent's incapacity to engage in an antitrust conspiracy with his corporate principal, *see, e.g., Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1316-18 (8th Cir. 1986), or in terms of a direct sale between the antitrust defendant and the purchaser (in which case there is no resale by the distributor), *see, e.g., Overhead Door Corp. v. Nordpal Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,595 (D. Minn. 1978), the analysis is essentially the same. To establish a case of resale price

maintenance by a manufacturer, the antitrust plaintiff must demonstrate that (1) the manufacturer has contracted, combined, or conspired (2) with a separate economic entity (3) to set the price at which the products are resold (4) in an independent commercial transaction with a subsequent purchaser. We find that as a matter of law Eden acts as Ryko's agent, for antitrust purposes, in those sales in which Ryko sets the retail price of its machines. Accordingly, we hold that Eden failed to present a submissible case for the jury on its claim of resale price maintenance.

In *United States v. General Electric Co.*, 272 U.S. 476 (1926), the Supreme Court held that a manufacturer could, without incurring liability for vertical price fixing, sell merchandise directly to the consumer through a network of distributors acting as sales agents of the manufacturer. General Electric employed a consignment plan whereby the company fixed the price of incandescent lamps sold by retailers to the public. The Court held that by means of a "genuine contract[] of agency," a manufacturer lawfully could "dispose of his article directly to the consumer and fix[] the price by which his agents transfer the title from him directly to such consumer." *Id.* at 488.

Almost forty years later, in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), the Court considered a similar consignment system employed by a number of the major oil companies. Union Oil Company sold gasoline nationally through over three thousand retail service stations. The company delivered gasoline on consignment to station operators, who sold it at prices determined by Union. Although Union retained title to the gasoline until it was sold at the pump, the operator was "responsible for all losses of the 'consigned' gasoline in his possession, save for specified acts of God." *Id.* at 15. This time, the Court was less sympathetic, holding that the consignment device was a mere sham that served to

cover a vast gasoline distribution system that involved illegally fixing resale prices. *Id.* at 21. The Court concluded that a supplier could not, "by clever manipulation of words," restrain price competition between otherwise independent retail distributors. *Id.* at 22.

Simpson does not mean that legitimate agency or consignment arrangements can give rise to antitrust liability. "[A]n owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner," *id.* at 21, because a sales agent, when acting within the scope of his agency, is incapable of engaging in an antitrust conspiracy with his corporate principal. *Pink Supply*, 788 F.2d at 1316; *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1336 & n.1 (9th Cir. 1983). *Simpson* thus did not overrule *General Electric*. *See Pogue v. International Industries, Inc.*, 524 F.2d 342, 345 (6th Cir. 1975). Rather, the Court limited the scope of its prior decision, and refined the courts' inquiry in evaluating similar agency claims.

Under *Simpson* we are directed to examine the various substantive "indicia of entrepreneur[ship]" and the allocation of business risks, rather than the mere form of the agreement, in evaluating the economic substance of an agency or consignment. 377 U.S. at 20. If a distributor deals with his supplier as an "independent businessman" who bears most or all of the risks on transactions with purchasers, then an agency or consignment agreement is ineffective to insulate the manufacturer from antitrust liability for fixing resales prices. *Id.* at 20-21; *Greene v. General Foods Corp.*, 517 F.2d 635, 652-53 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). However, where the manufacturer bears the financial risks of transactions with the customers and continues to retain "title, dominion and control over its goods," *Pogue*, 524 F.2d at 345, then it is likely that the distributor is merely an agent for the manufacturer. *See also Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 342-43 (9th Cir.) (no

resale price maintenance where defendant bore "significantly greater risks" in sales of goods through plaintiff distributors), *cert. denied*, 464 U.S. 820 (1983).

This analysis is limited to examining the distributor's role vis-a-vis transactions allegedly involving an antitrust violation. A distributor may act as his supplier's agent when performing certain duties in a business relationship, but as an independent entrepreneur when performing others. Hence, in *Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806, 809-10 (5th Cir.), *cert. denied*, 444 U.S. 836 (1979), the operator of a drive-in convenience store and gas station was held to be a sales agent of the defendant when making sales of gasoline, although she was an independent entrepreneur when making grocery sales. The court noted that the operator bore none of the financial risks of the gasoline sales, *id.* at 810-811, and concluded that the operator "was, for purposes of the antitrust laws, operating a company station as an employee." *Id.* at 809. The court held that the economic substance of the relationship more closely resembled an agency, even though "the agreement [between the operator and the defendant] itself provided that the station operator was to be considered an independent contractor." *Id.* at 809, 811.

Here, as in *Hardwick*, our focus is not on Eden's entire business relationship with Ryko. Rather, we are concerned with Eden's role in sales for which Ryko fixed the price charged the purchaser of the equipment. Eden's role as agent or entrepreneur in making non-NAP sales, in which Eden is free to charge whatever the market will bear, therefore is irrelevant to our analysis of the resale price maintenance claim. Similarly, we are bound neither by Eden's nor Ryko's characterization of the distributorship relationship, nor by language in the distributorship contract disclaiming that Eden acts as Ryko's agent "for any purposes whatsoever." *Simpson* directs us to decide Eden's role based on the substance of the economic relationship, and not exclusively on the terms that

the parties used to characterize Eden's role. 377 U.S. at 21-22; *see also Illinois Corporate Travel, Inc. c. American Airlines, Inc.*, 806 F.2d 722, 725-26 (7th Cir. 1986) (agency determined by reference to objective factors, rather than to parties' subjective intent).

We must examine Eden's role and the types of business risks it bears in two types of transactions involving NAP-designated customers: (1) sales by purchase order and (2) sales by sight draft. The parties agree that transactions of the first type are covered by the NAP and are subject to the program's pricing structure. Regarding the second type of transaction, there is disagreement. Eden argues that these sales to NAP-designated customers also were covered by the NAP, and accordingly were subject to Ryko's price controls. Ryko disputes this, contending that no sight-draft sales, including those to NAP-designated customers, were subject to NAP pricing policies.[2] We consider each type of transaction in turn.

Purchase Order Sales

We have no difficulty in deciding that, as a matter of law, Eden failed to produce sufficient evidence from which a jury reasonably could conclude that Eden acts as a separate business entity, independently bearing economic risks of independent commercial transactions in soliciting purchase order sales under the NAP. In both substance and form, Eden acts as Ryko's agent in effecting purchase order sales between Ryko and the NAP customers, and Ryko therefore cannot be held liable for fixing the price of equipment so sold.

Eden repeatedly refers us to *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424

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[2] Sight-draft sales to non-NAP designated customers clearly fall outside the NAP pricing structure. Eden was free to charge whatever price the market would bear on these types of transactions, and they therefore are irrelevant to our analysis of the resale price maintenance claim.

U.S. 942 (1976), urging that its business relationship with Ryko closely resembles the arrangement held to constitute resale price maintenance in that case. We are not persuaded that the similarities are sufficient to compel the same result here. In *Greene*, General Foods employed a similarly bifurcated program of both direct and national account sales to service the entire market for its coffee products. *Id.* at 640. Distributors were free to charge any price for direct sales to ordinary customers, but sales to national account customers were priced according to a schedule set by General Foods. *Id.* at 640-41. The distributor in *Greene* "held title to all goods he acquired from General Foods," took possession of the goods, and "stored them in his warehouses at his own expense and at his risk of loss." *Id.* at 641. Deliveries for both direct and national account sales were made from the distributor's own stocks, and the distributor was responsible for billing national account purchasers, using invoices written in the name of General Foods. *Id.*

In contrast, Eden never took possession of Ryko machines sold under purchase order, nor did it bear any of the responsibility for billing the NAP purchasers. Eden merely filed the purchase order with Ryko and received its commission after Ryko collected on the account. Unlike General Foods, Ryko never parted with title, dominion, or control over the machines before passing them to the NAP customer. Eden's distributorship contract specifies that purchase orders for machines ordered under the NAP are to be issued in Ryko's name and not Eden's.[3] Ryko bears all the credit risks in the transactions and performs its own billing on NAP purchase order sales. Where required, Ryko secures the necessary electrical approvals, engineering inspections, and government oper-

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[3] This is more than a mere paper formality; Ryko uses the NAP purchase order as collateral for operational financing, relying on the creditworthiness of the major oil company buyers to secure loans approaching the face value of the purchase orders. Tr. 453.

ating permits for its equipment. Ex. 5, 38, P-3; Tr. 864-867. *Compare Hardwick*, 589 F.2d at 810 (defendant acquired and maintained all necessary permits). Eden occasionally was involved in securing such approvals, but only to the extent necessary to have its own water reclaim system approved for use in connection with a Ryko car wash. Ex. B-3, Q-3.

Because the machines are never in Eden's possession, Eden bears none of the risks attendant to warehousing them prior to sale. Although Ryko requires its distributors to make minor repairs on machines damaged in transit,[4] the distributors may make claims against the carriers for repair expenses so incurred. While satisfactory resolution of these shipping damage claims is not always forthcoming, such obligations do not, without more, constitute a meaningful shifting of the risk of loss on purchase order transactions.

Eden repeatedly attempts to characterize NAP customers as its own, apparently relying on language from *Greene* regarding the distributors' sales efforts in that case.[5] In *Greene*, General Foods apparently performed

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[4] Ryko ships goods sold under the NAP in the name of the purchaser, FOB Des Moines, which means that the ultimate purchaser, rather than Eden, is legally responsible for the goods during shipment. *See* Iowa Code §§ 554.2319, 554.2401, 554.2509. However, Eden demonstrated that in practice Ryko requires its distributors to take responsibility for minor shipping damage. *See, e.g.*, Ex. R-4, U-4, Tr. 1446-49. Similarly, although the distributorship contract requires Eden to maintain liability insurance covering the machines and Eden's installation and service work, Eden admitted that Ryko has not strictly enforced the provision. Tr. 1109. Moreover, it is unclear whether Eden could be held legally responsible for damage caused by a machine to which Eden never holds title, and Eden has presented no evidence that it actually purchased the insurance coverage.

[5] In *Greene*, the court suggested that one of the central issues in applying *Simpson* to the facts of that case was to decide "who was a customer of whom." 517 F.2d at 655. Indeed, the District

none of the solicitation and promotion of the national account customers and products. 517 F.2d at 657-58. At trial, Eden asserted that Ryko similarly had no significant relationship with NAP customers and no involvement in most NAP sales. The evidence flatly contradicts such an assertion. Eden's contact with oil company district managers and individual station operators clearly gives it closer personal contact with individuals at the local level. However, Ryko submitted uncontradicted evidence demonstrating that it promotes and submits bids on equipment directly to NAP customers and that it has received orders for purchases of machines from the customers so solicited. *Cf. Mesirow*, 703 F.2d at 343 (defendant promoted and serviced direct-billed accounts).

Court here submitted the *Simpson* inquiry to the jury in exactly the same terms. Jury Instruction 19. Ryko has not objected to the form of this instruction, and because of our view of the evidence, we need not decide whether the instruction constitutes plain error. However, we note that the instruction seriously misstates the law and would be grounds for reversal if Ryko had objected to the form and content of the instruction, rather than relying solely on its objections regarding the sufficiency of the evidence. *Simpson* clearly directs our attention to the economic risks involved in the transactions, not to an ambiguous inquiry regarding the loyalties of the ultimate consumer. To instruct a jury to conduct a *Simpson* inquiry by deciding whose customers belong to whom is to invite the jury to speculate about personal relationships between the parties, and to draw conclusions based solely on evidence regarding promotional efforts, rather than on the actual assumption of economic risk. A jury reasonably could conclude, if put to the choice, that buyers of products from a manufacturer's sales representative were "customers" of the representative, rather than of his employer. Indeed, if the sales representative were to change employers, many of his former customers might be expected to continue to do business with him and to begin ordering goods from the representative's new supplier. However, as a matter of antitrust law, both of the representative's employers would be equally free to set the price at which he sold their goods, regardless of whether the ultimate buyers might be considered "customers" of the representative.

Testimony from a local franchise of one of the national accounts—that he had no real relationship with Ryko's central management—is not a sufficient basis for the inference that Eden was solely responsible for NAP sales in its territory. Eden has demonstrated that its sales efforts are in some cases necessary, but it has not proved that they are ever sufficient to make sales to NAP customers. The situation here, where selling responsibility is divided among Ryko's central management, its regional sales representatives, and its local distributors, is far different from the situation in *Greene*, where "the actual 'selling'—the solicitation of orders, the moving of merchandise, most of the risk of loss, and the day-to-day task of creating and maintaining customer satisfaction—[was] performed by Greene . . . and not by some central selling staff of General Foods." *Greene*, 517 F.2d at 657-58. Where the evidence shows that the distributor is not solely responsible for making the sales, we believe the distributor must produce more substantial evidence of its independence under *Simpson* to justify submitting a resale price maintenance claim to a jury. *Cf. Overhead Door Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,595, at 77,431 (evidentiary burden greater where defendant participates in sales efforts to national customers and where plaintiff can set prices for sales on his own account).

We are unpersuaded that Eden's selling efforts to NAP customers would satisfy the *Simpson* test even if Ryko were not jointly responsible for the sales. Responsibility for soliciting and forwarding purchase orders and for maintaining and repairing equipment is consistent with Eden's status as Ryko's agent, and does not demonstrate Eden's entrepreneurial independence. *See Calculators Hawaii*, 724 F.2d at 1336. Similarly, Eden's required capital investment as a distributor apparently was limited to $500. Tr. 721. We do not believe this

limited investment reflects the type of independent risk bearing that was present in *Simpson* or *Greene*. Finally, the method by which Ryko compensates Eden with respect to NAP sales—a price-based commission with which Eden must cover its own operating expenses—is a similarly insufficient basis for the conclusion that Eden acts as an independent entrepreneur with respect to NAP sales. Such compensation by commission is totally consistent with Eden's role as a sales agent; it does not, standing alone, illustrate Eden's entrepreneurial independence. *Cf. Holter v. Moore and Co.*, 702 F.2d 854, 856 (10th Cir.), (citing *American Oil Co. v. McMullin*, 508 F.2d 1345, 1351-52 (10th Cir. 1975)), *cert. denied*, 464 U.S. 937 (1983).

Sight Draft Sales

Eden points out that some of its sales to NAP customers have been made by sight draft, and in those sales Eden has taken title to the machines before "reselling" them to the customer. *See, e.g.*, Ex. C-7, D-7, L-7, V-7, W-7, X-7. Eden argues that under *Simpson* and *Greene*, it bears the economic risks in these sight draft transactions, but is prohibited by the NAP provisions of the distributorship contract from negotiating a price different from the NAP price for machines so sold. Eden repeatedly asserts that NAP pricing is "mandatory" for all sales to NAP customers, regardless of whether Eden secures purchase orders for Ryko or sells the machines by sight draft. Ryko admits that Eden takes title to machines sold by sight draft, but argues that NAP pricing does not apply to any sight-draft sales, even those to NAP-designated customers.

The lesson of *Simpson* is that locus of title is not itself a sufficient basis on which to determine antitrust liability. 377 U.S. at 21-22. The real issues are whether Eden bears significantly greater economic risks in sight-

draft transactions with NAP customers than it does in soliciting purchase orders, and, if so, whether Ryko conspired to fix Eden's resale price in sight-draft transactions. We believe that Eden again failed to submit sufficient evidence from which a jury reasonably could infer that Eden bears such risks, even on those sales in which it takes title to the machines and then passes them on to NAP-designated customers.

Eden apparently requires its purchasers in sight-draft transactions to deposit the purchase price with Eden's bank before Eden will issue the necessary sight draft to Ryko for final delivery. Ex. 93. This type of prepaid transaction does not involve significantly greater financial risks than purchase order transactions, because Eden incurs no liability for payment on the machines before it receives advance payment from the customer. Eden has not produced evidence suggesting that it buys machines on speculation, provides financing for,[6] or takes possession of machines sold to NAP customers by sight

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[6] In a sales proposal of a Gulf Oil Company district office, Eden referred to one prior sale in which it accepted a purchase order from Gulf covering the equipment, construction, plumbing and electrical work involved in the installation of a Ryko machine. Ex. 4; Ex. DDD. In the letter, Eden requests that the purchase order for the latest proposal be separated into its various components (and that the order for the machine be made out directly to Ryko) to relieve Eden "of the burden of financing the project up front, as we did for the Columbia project . . . ." Ex. 4. The letter makes clear that Eden did not wish to make a practice of providing such financing for the customer. Significantly, on the sale proposed in the letter, Ryko extended 30-day credit to Eden, thus relieving Eden of the responsibility of issuing a sight draft for delivery of the equipment before Eden received payment from the customer. Eden assured Ryko that "normal bid and contract procedures" would be followed on the next sale. Ex. 14. Given Eden's own characterization of such financing as an exception, we do not believe this single instance should be significant in our analysis of the entire economic relationship.

draft before final delivery to the customer.[7] Similarly, although Eden is responsible for the collection and payment of state sales taxes on sight-draft sales, we do not believe that this added responsibility significantly shifts the locus of risks in the transactions.

Finally, Eden has not demonstrated that Ryko is any less involved in promoting and soliciting national approval for its products sold to NAP customers by sight draft than for those sold by purchase order, nor has Eden shown that it bears significantly greater economic risks in these sales. Accordingly, for sight-draft sales to NAP customers, we also conclude that Eden has produced insufficient evidence of its independent entrepreneurial status to support a jury verdict. Moreover, even if we held that Eden produced sufficient evidence of risk bearing, we would be unable to affirm the resale price maintenance verdict, because Eden has failed to show that Ryko conspired to fix the prices that Eden charged its customers on sight-draft sales.

Eden bears the burden of "present[ing] direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Monsanto*, 465 U.S. at 764 (citation omitted). The plaintiff must produce evidence that is "sufficient for the jury to determine not merely that the manufacturer . . . conspired, but that . . . [it] conspired *to maintain resale prices*." *McCabe's Furniture*, 798 F.2d at 329 (citation omitted) (emphasis added). To meet this burden, Eden relies exclusively on its interpretation of the

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[7] Although Eden produced two invoices purporting to show that Ryko had delivered machines directly to Eden for installation at other locations, neither of these sales were to NAP customers. Ex. E-8, F-8. One of the sales was to a previous NAP customer, but the customer had been removed from the NAP approximately a year before the sale, and Ryko no longer required its distributors to give the customer NAP pricing. Ex. H-2.

NAP provisions contained in its distributorship contract with Ryko and on the various NAP policy statements implementing those provisions. This is not a case involving complaints by other distributors about a price-cutting distributor or warnings from the manufacturer that it would not tolerate price deviations by its distributors. *Compare Monsanto*, 465 U.S. at 763, 765. In these circumstances, a jury could not reasonably find that Ryko entered into an agreement to fix Eden's resale prices unless the contract provisions and policy statements themselves fix those prices.[8]

Although Ryko has admitted that the NAP dictates the price at which goods are sold by purchase order directly to the NAP customers, Ryko denies that the NAP policies apply to sight draft sales. Eden argues that the contract provisions and the policy statements constitute an agreement to fix prices for all sales to NAP customers, either by sight draft or by purchase order. In the alternative, Eden argues that Ryko's "agreements" with the NAP customers regarding the availability of equipment at NAP prices satisfy the concerted action requirement.[9]

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[8] Ryko objected only to the sufficiency of the evidence on the proof of an antitrust agreement, and we therefore are extremely limited in our review of the instruction regarding the required finding. *See Denniston v. Burlington Northern, Inc.*, 726 F.2d 391, 393 (8th Cir. 1984) (citing *Board of Water Works Trustees v. Alvord, Burdick & Howson*, 706 F.2d 820, 824 (8th Cir. 1983)). We do not believe that, as a matter of Iowa law, the jury was the proper interpreter of Eden's legal obligations under the distributorship contract. *See, e.g., Farm Bureau Mutual Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 107-08 (Iowa 1981). However, because of our view of the evidence, we need not decide whether submitting the interpretation of the NAP contract provisions to the jury constituted plain error.

[9] The instructions allowed the jury to find that Ryko had conspired with the final consumers to fix prices. Special Interrogatory 5(a), which the jury answered in the affirmative, asked the jury whether Ryko had agreed with "its distributors and/or its national

The evidence does not support Eden's interpretation of the relevant contract provisions.[10] At trial, Eden attempted to isolate the pricing provisions of the distribu-

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account customers to fix the resale prices of Ryko's car washing equipment." Again, we are faced with an instruction to which no objection was raised, but which does not state the law. We do not agree with the suggestion that a supplier may be found to have conspired with the consumer to fix resale prices. *Compare Rea v. Ford Motor Co.*, 497 F.2d 577, 590-91 & n.29 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974). Ryko is perfectly free to fix a price for its products and to solicit sales at that price without incurring antitrust liability. *Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1187-88 (9th Cir. 1984). "There is an obvious agreement between [a supplier] and its direct customer, the buying consumer. But such omnipresent agreements are not resale price restraints." P. Areeda, VII *Antitrust Law* ¶ 1451(f) (1986). However, because we hold that Eden did not produce sufficient evidence to demonstrate a conspiracy between Ryko and its NAP customers regarding the price for machines sold by sight draft, we need not address as plain error the validity of Eden's theory that Ryko may be found liable for entering into such an agreement with the ultimate consumer.

[10] The provisions of Eden's distributorship contract (Ex. 1) dealing with the NAP are as follows:

> IV. *PRICE AND CREDIT STRUCTURE.*
>
> . . . .
>
> E. Pricing structures for all major oil companies and national accounts shall be determined by the Company [Ryko]. Accounts may be declared national accounts at the Company's discretion.
>
> . . . .
>
> G. Purchase orders issued from major oil companies or national accounts headquarters will be issued in the name of the Company and shall be sent directly to the Company.
>
> H. Purchase orders issued from major oil companies or national accounts headquarters shall not require a deposit and goods concerned will not be shipped on a sight draft.
>
> I. Billing of purchase orders issued by major oil compan[ies] or national account headquarters will be handled by the Company. Commissions on said accounts will be paid to the Distributor upon collection of the purchase order price.

torship contract and policy statements, *see, e.g.*, Tr. 433-40, while ignoring the provisions regarding the method of sale. This approach cannot withstand scrutiny, because it attempts to separate the NAP pricing structure from the rest of the NAP provisions. Eden must show that Ryko "*knowingly* participated in an arrangement *with an intent*" to engage in resale price fixing. *Impro Products, Inc. v. Herrick*, 715 F.2d 1267, 1276 (8th Cir. 1983). Moreover, Eden must show that Ryko attempted to fix Eden's resale prices or attempted to terminate Eden as "part of or pursuant to" such an arrangement. *Monsanto*, 465 U.S. at 767. Neither of these inquiries may be answered by reference to a single provision of the NAP. The contract and the policy statements implementing the program should be construed as a whole, without focusing on one clause to the exclusion of the others. *See Allen v. Highway Equipment Co.*, 239 N.W. 2d 135, 139 (Iowa 1976).

The contract clearly permits Ryko to determine prices for national accounts, but equally clearly establishes the transactional procedure to be followed in making NAP sales. The contract directs Eden to make NAP sales by soliciting customer purchase orders issued directly to Ryko. The program does not apply to sight-draft sales for Eden's own account; the contract plainly states that equipment ordered under the NAP "shall not require a deposit" and "will not be shipped on a sight draft." The NAP policy statements confirm the procedure, emphasizing that NAP sales are made on credit to the NAP purchaser, based on purchase orders issued in Ryko's name. Ex. 70, 78, 80, I; J.A. 255.

Eden's sight-draft sales to some NAP customers at NAP prices are not evidence to the contrary. While such sales might be consistent with an agreement regarding prices on sight-draft sales, they do not demonstrate that such an agreement exists. "[C]onduct as consistent with permissible competition as with illegal conspiracy does

not, standing alone, support an inference of antitrust conspiracy." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357 (1986). Indeed, the evidence suggests that Eden was coerced not by Ryko but by the demands of informed consumers to charge NAP prices on these sales. Although it borders on the ridiculous to assert that a manufacturer's supply agreements with end-users could ever meet the concerted action requirement for resale price maintenance,[11] in this case Ryko's NAP customer agreements clearly do not attempt to fix Eden's prices on sales for its own account. Rather, the agreements merely assure the NAP customers of discounted prices for equipment purchased directly from Ryko. If potential buyers already knew the price at which they could purchase a machine directly from Ryko, distributors would find it extremely difficult to sell to those same buyers at a higher price. Eden's contractual duties to solicit and to accept NAP purchase orders for Ryko equipment at NAP prices do not transform the NAP customer agreements into conspiracies to fix Eden's resale prices.

Finally, although Ryko's initiation of a declaratory judgment action following Eden's bid to Crown McLean, a Virginia customer, may demonstrate Ryko's dissatisfaction with Eden's performance as a distributor, Eden has failed to produce evidence that Ryko's response was pursuant to an illegal price fixing agreement. *Monsanto* makes clear that "independent action by the manufacturer, and concerted action on nonprice restrictions [must] be distinguished from price-fixing agreements." 465 U.S. at 763. The *per se* rule does not apply to a manufacturer's unilateral termination of a price-cutting distributor, *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 523 (8th Cir. 1987), nor does it

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[11] *See* footnote 9, *supra.*

apply to the manufacturer's contractual imposition of nonprice restrictions. *See Sylvania*, 433 U.S. at 51 n.18.

Eden's bid to Crown culminated a year-long deterioration in its business relationship with Ryko. More significantly, Eden's bidding tactics were not well received by Crown's central management, who informed Ryko that such tactics would "make it difficult to maintain the trust and credibility between our companies." Ex. 28. Eden's bid to Crown included a discount off the NAP price, which Eden suggests was the true reason for Ryko's response. However, the location of the proposed project was an exclusive territory that was the subject of an ongoing dispute between Eden and Ryko, and the bid included a proposal for the installation of Eden's own water reclaim system, which Ryko maintains was in violation of the exclusive dealing provisions of the distributorship contract.

Given these circumstances, we do not believe that Ryko's response to the bid reasonably can be viewed either as inconsistent with permissible defense of its business relationship with its NAP customers or as evidence of an agreement restricting Eden's resale prices on sight-draft sales. *Cf. Matsushita*, 106 S. Ct. at 1357. Eden has demonstrated the extent of its contractual dispute with Ryko. The evidence, however, simply does not support Eden's resale price maintenance claim. This case does not involve a dominant supplier's control of retail prices through a vast network of independent distributors who bear the primary risks of the distribution process. *Compare Simpson*, 377 U.S. at 20-22; *Green*, 517 F.2d at 653. We conclude that the evidence was not sufficient to place the resale price maintenance claim before the jury, and that with respect to this claim the District Court erred by denying Ryko's motion for judgment notwithstanding the verdict.

Exclusive Territories

Ryko next appeals the jury verdict in favor of Eden on its claim that the exclusive territory provisions of Ryko's distributorship contracts violate Section 1 of the Sherman Act. These provisions grant each distributor the exclusive right to sell Ryko products within an assigned territory [12] and prohibit the distributor from selling Ryko products outside that territory.

The Supreme Court recently has reaffirmed the well-established rule that "[contractual] nonprice restrictions imposed by a single manufacturer [on its distributors] are to be judged under the rule of reason." *324 Liquor Corp. v. Thomas Duffy*, 107 S. Ct. 720, 724 (1987). In applying this rule to a particular nonprice restraint, we must examine the relevant market and weigh any loss in intrabrand competition caused by the restraint against any corresponding gain in interbrand competition. *Sylvania*, 433 U.S. at 54-55. Notwithstanding the broad applicability of the rule recognized in *Sylvania*, Eden urges here, as it did below, that a *per se* rule should apply to Ryko's exclusive territory provisions. Eden argues that Ryko's practice of acting as its own distributor in territories where it has no other distributor (such as Eden) [13] transforms the otherwise vertical distributorship contracts into horizontal agreements among competing distributors.

Although there is some support for Eden's position, especially where an agreement restricts a distributor

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[12] Although Eden's contract designates only the District of Columbia and Maryland as Eden's exclusive territory, Eden's claim to distribution rights in certain portions of northern Virginia is a part of this lawsuit.

[13] This practice is known as dual distribution. The term is useful here only in discussing Ryko's sales to its distributors for their own account. As discussed earlier, for antitrust purposes the distributors act as Ryko's agents in making NAP sales.

who also competes with the supplier in the manufacture of certain products in the relevant market, *see, e.g., Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899-900 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973), we believe the better-reasoned cases examine nonprice restraints in the dual distribution context under the rule of reason. *See Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 (9th Cir. 1986), *modified on other grounds*, 810 F.2d 1517 (9th Cir. 1987); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1201-02 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1355-57 (9th Cir. 1982); *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 663 F.2d 405, 409-11 (2d Cir. 1981); *Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422, 425-28 (5th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1005 (5th Cir.), *cert. denied*, 454 U.S. 827 (1981). We are mindful of the Supreme Court's directive that we depart from the rule of reason only "upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." *Sylvania*, 433 U.S. at 59. Moreover, in dealing with vertical nonprice restraints the focus of antitrust concern is the impact of a particular restraint on interbrand competition, rather than its impact on intrabrand competition. *Id.*, at 52 n.19; *see also Copy-Data Systems*, 663 F.2d at 409. This is especially true in cases where substantial competition in the interbrand market provides a check on the exploitation of intrabrand market power by providing a ready supply of adequate substitutes to consumers. *Copy-Data Systems*, 663 F.2d at 409. *But see Eiberger v. Sony Corp.*, 626 F.2d 1068, 1081 (2d Cir. 1980).

When competing distributors conspire with their supplier to impose restrictions that redound primarily to the

benefit of the distributors, the agreement should be considered horizontal even though it is vertical in form. *See United States v. Sealy, Inc.*, 388 U.S. 350, 353-54 (1967). Absent such an attempt to disguise a conspiracy for the benefit of competitors, "[i]f the evidence is consistent with the hypothesis that the firm at the top of the vertical chain designed the restrictions for its own purposes, an inference of [horizontal] conspiracy is inappropriate." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986). Accordingly, we conclude that the District Court correctly decided that the rule of reason applies to the exclusive territory provisions of Ryko's distributorship agreements.

Having carefully examined the record from a rule-of-reason perspective, we hold as a matter of law that Eden did not present a submissible case that the exclusive territory provisions were unreasonable. As a preliminary matter, the plaintiff's "[p]roof that defendant's activities had an impact upon competition in the relevant market is 'an absolutely essential element of the rule of reason case.'" *Supermarket of Homes, Inc. v. San Fernando Board of Realtors*, 786 F.2d 1400, 1405 (9th Cir. 1986) (quoting *Calculators Hawaii*, 724 F.2d at 1338). It follows that a showing that the defendant has market power is equally essential, because "[f]irms lacking market power . . . cannot adopt restraints that have anticompetitive effects . . . [and thus] cannot have an effect on interbrand competition." *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 316 (8th Cir. 1986). Notwithstanding dicta from two of this Court's prior decisions, *see id.* at 316 n.14 (citing *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1024-25 (8th Cir. 1985) and *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969)), we agree with the approach adopted by other circuits requiring "at the threshold that the plaintiff attacking a vertical nonprice restraint prove the de-

fendant's substantial market power in a relevant market." *Assam*, 798 F.2d at 316 (citing cases).[14]

Market power generally is defined as the power of a firm to restrict output and thereby increase the selling price of its goods in the market. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986). Market power may be shown by a firm's percentage of sales in the market, especially where there is a strong consumer preference for the firm's product (which decreases the competitive impact of substitues) and where there are significant barriers either to the entry of new firms or to increased output by existing firms. *Id.* at 1335-36. On the other hand, direct evidence of competitive pressure—demonstrated by a significant number of viable competitors in the market, *see, e.g., Red Diamond Supply*, 637 F.2d at 1005, or by the entry of new competitors, *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 761 (D. Md. 1980), *aff'd*,

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[14] Nothing in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), or *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986), is to the contrary. In those cases, the Supreme Court observed in the context of horizontal combinations that "the absence of proof of market power does not justify a naked restriction on price or output." 468 U.S. at 109-10; *see also* 106 S. Ct. at 2018-19. The vertical restrictions at issue here obviously do not involve a "naked" attempt to restrict output or raise prices. Rather, they are " 'ancillary's restraints, those that are part of a larger endeavor whose success they promote." *Polk Bros., Inc. v. Forest City Enterprises*, 776 F.2d 185, 188-89 (7th Cir. 1985). It is true that " 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' " *Indiana Federation*, 106 S. Ct. at 2019 (quoting VII P. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)). However, unless the plaintiff can demonstrate an "actual detrimental effect" on competition (which in a meaningful sense demonstrates the defendant's market power), the threshold market power requirement mitigates an otherwise "unlimited inquiry necessary under the rule of reason." *Assam*, 798 F.2d at 316. Here, Eden's own witness admitted that he had no evidence that the territorial restrictions had any impact on market price or output. Tr. 1728-29.

638 F.2d 15 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981), or even by the product's price sensitivity—indicates a lack of market power. It is incumbent on the plaintiff to present evidence of defendant's power in the relevant market, and we find as a matter of law that Eden failed to meet this requirement.

Eden devoted much of its time at trial attempting to convince the jury that Ryko was the dominant force in a small market consisting only of automatic "rollover" car-wash machines. The jury specifically rejected this narrow characterization of the market, finding instead that the relevant product market encompassed car-washing equipment in general, "including automatic rollover machines, drive-thru machines, tunnel equipment and wand or hand-held equipment." Special Interrogatory 9. The determination of the relevant market is an issue for the trier of fact, *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987), and here the record adequately supports the jury's finding.[15]

Ryko clearly does not possess the type of market power that would allow it to restrict output or raise prices in the relevant market found by the jury. Eden's entire case regarding Ryko's market power rested on an assumption that the relevant product market consisted only of auto-

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[15] There was ample evidence from which the jury could conclude that the various car-wash systems were essentially interchangeable in the eyes of consumers and that the systems formed one relevant product market. Tr. 2060-64. Eden's expert witness gave testimony regarding the distinct markets served by the various kinds of equipment and argued that rollovers, tunnel washers, and wand systems were not competitive substitutes for one another. However, on cross-examination, the same witness volunteered, without being asked, that locating the three types of systems in close proximity to one another "would have been a bad marketing decision." Tr. 1717. The jury could have concluded that if the three systems comprised distinct product markets and truly were not in competition with each other, then their proximity should not have any effect on their profitability.

matic rollover machines. Eden's expert witness focused exclusively on Ryko's share of the automatic rollover market, Tr. 1699-1700, 1709, and he admitted that he had insufficient data from which to draw conclusions regarding Ryko's market power in a more broadly defined market. Tr. 1725. The record shows that Ryko's share of the entire relevant market is at most between 8% and 10%. This makes it the second largest car-wash equipment manufacturer, which suggests a market whose supply side consists of many small competitors.

Although some of Eden's witnesses testified that equipment buyers have a strong preference for Ryko's rollover equipment, such preferences are not, without more, a sufficient basis for finding the extent of market power. This is particularly true where, as here, the testimony regarding consumer preference for a particular item pertains to a narrow product submarket, rather than to the broader relevant product market. Similarly, although Ryko represents itself in sales material as the "recognized leader" or "the Cadillac" of the car-wash industry (and Eden's counsel repeatedly attempted at trial to characterize these types of statements as evidence of market dominance, Tr. 751-59), such self-serving promotional literature hardly can be viewed as evidence of market power. In any case, it clearly is not sufficient in this case. The evidence shows that Ryko has lost sales when its competitors lowered their prices in the submarket for rollover machines, Ex. 74, and that Ryko has little or no share of the submarket for drive-thru equipment. Ex. W. Finally, we note that the District Court was persuaded that Ryko could not safely post a supersedeas bond for more than $300,000 without jeopardizing its business. It seems absurd to suggest that such a company has substantial market power in a nationwide industry with annual revenues of between $150 and $225 million. Ex. 114-117.

The jury could not reasonably have concluded, based on the evidence presented, that Ryko possessed market

power in a relevant product market including all types of car-wash equipment. Absent an adequate showing of market power, or of actual detrimental effects on competition, the jury did not have a sufficient basis from which to conclude that Ryko's territorial restrictions unreasonably restrained competition. Accordingly, the District Court erred in denying Ryko's motion for judgment notwithstanding the verdict on Eden's Sherman Act claim with respect to the exclusive territory provisions.

Exclusive Dealing

Eden claims, and the jury found, that the exclusive dealing provisions of its distributorship contract, which prohibit the distributor from promoting or selling products that compete with Ryko's, violate Section 1 of the Sherman Act and Section 3 of the Clayton Act.[16] Contracts imposing an obligation on a distributor to deal only in the goods of a single supplier will violate Section 3 when "performance of the contract will foreclose competition in a substantial share of the line of commerce affected. . . . That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited . . . ." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961). This test requires us to examine the character of the relevant market and to assess the competitive impact of the alleged restraints. We no longer evaluate foreclosure under the purely quantitative test of earlier decisions. *Compare Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949) (*Standard Stations*) (quantitative test) *with Tampa Electric*, 365 U.S. at 329 (substantiality of foreclosure determined by more detailed analysis of the "prob-

[16] The parties did not extensively address the Section 1 claim in this appeal, but our resolution of the Clayton Act claim disposes of the issue. If a contract is not prohibited by "the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the [Sherman Act]." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 335 (1961).

able effect of the contract on the relevant area of effective competition"). Where the degree of foreclosure caused by the exclusivity provisions is so great that it invariably indicates that the supplier imposing the provisions has substantial market power, we may rely on the foreclosure rate alone to establish the violation. However, where, as here, the foreclosure rate is neither substantial nor even apparent, the plaintiff must demonstrate that other factors in the market exacerbate the detrimental effect of the challenged restraints. *Cf. Beltone Electronics Corp.* 100 F.T.C. 68, 204, 209-10 (1982) (requiring more extensive analysis of the "dynamics of the affected market" even where rate of foreclosure is not "clearly insignificant").

We agree with the conclusion reached by the FTC in *Beltone* that in light of *Sylvania* and its progeny, exclusive dealing should be evaluated under an analysis "which takes into account not only the market share of the firm but the dynamic nature of the market in which the foreclosure occurs." *Id.* at 197. The inquiry is not precisely the same as the rule of reason employed to evaluate vertical nonprice restrictions under the Sherman Act. However, the plaintiff must show "that the restraint . . . has a probable adverse effect on interbrand competition." *Id.* at 208. This showing depends upon an analysis of such market factors as: the willingness of consumers to comparison shop and their loyalty to existing distributors; the existence of entry barriers to new distributors; the availability of alternative methods of distribution; and any trend toward growth (or decline) in the level of competition at the supplier level. *See id.* at 210; *see also Joyce Beverages v. Royal Crown Cola Co.*, 555 F. Supp. 271, 278 (S.D.N.Y. 1983) (availability of alternative methods of distribution precludes finding that supplier is foreclosed from market); *see generally* Steuer, *Exclusive Dealing in Distribution*, 69 Cornell L. Rev. 101 (1983).

Eden has produced no evidence suggesting that Ryko's exclusive dealing provisions generally prevent Ryko's competitors from finding effective distributors for (or other means of promoting and selling) their products. Rather, Eden charges that these provisions foreclose competition by preventing Eden from marketing its own water reclaim unit. The short answer to Eden's argument is that the concern of antitrust law is the protection of competition, not individual competitors; the law is not designed to relieve a particular business of the burden of making the difficult choice between manufacturing its own product or distributing the product of another concern. *See Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 488 (8th Cir. 1985) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977)). More generally, however, Eden's claim rests upon the assumption that car-wash equipment buyers prefer to engage in "one-stop shopping," and that to distribute an accessory product such as a water reclaim, a supplier must either employ a distributor who already carries a full line of car-wash equipment or must market a complete line of its own. Tr. 1702. Accepting this assumption at face value, we may conclude that manufacturers of accessory devices are foreclosed from the market to some extent by Ryko's exclusive dealing agreements with its distributors. However, Eden has not presented sufficient evidence from which a rational trier of fact could conclude that the foreclosure rate is "substantial" within the meaning of Section 3.

Eden argues that Ryko's 8% to 10% share of total sales in the relevant market demonstrates a corresponding rate of foreclosure sufficient to meet the test of *Tampa Electric*. We find this argument wholly unpersuasive. That Eden is prohibited from offering the products of competing manufacturers is not itself significant.[17]

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[17] Indeed, the overall effect on interbrand competition in such cases may be beneficial by focusing the distributor's efforts on

Ryko's other distributorship contracts are apparently less restrictive than Eden's, in terms of either the scope of the non-compete provision or its duration.[18] Accordingly, any foreclosure resulting from the provisions of Eden's contract would not necessarily apply to Ryko's other distributors, and Eden has presented no evidence suggesting a foreclosure rate arising from Ryko's other distributorship contracts. Moreover, there is no evidence that a substantial segment of the equipment buying market will deal only with Ryko's distributors, or that the exclusive dealing provisions have any impact on the ability of Ryko's competitors to make sales presentations to any potential customer through their own distributors or through direct sales representation. Where the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, we require a higher standard of proof of "substantial foreclosure," because it is less clear that a restraint involving a distributor will have a corresponding impact on the level of competition in the consumer market. *Cf. Bowen v. New York News, Inc.*, 366 F. Supp. 651, 679-80 (S.D.N.Y. 1973) (Section 3 claim dismissed where plaintiffs made no showing that

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one product line and, in turn, removing the "free rider" threat to the manufacturer's own selling efforts. Where, as here, the manufacturer engages in promotional activity that is designed to dovetail with the distributor's efforts, an exclusive dealing clause guarantees that the manufacturer's marketing investment will not be lost to other firms when the distributor makes his sales presentation to potential buyers. This assurance encourages the manufacturer's investment in marketing activity, and thus encourages interbrand competition. That Ryko's concern over its investment in marketing was legitimate is aptly illustrated by Eden's attempt to sell its reclaim by comparing Ryko's unfavorably to its own. Tr. 1001, 1025-26.

[18] Ryko repeatedly offered Eden updated contracts containing less restrictive exclusivity provisions, but Eden refused to sign the newer versions, in part because it preferred the protection offered by the more restrictive exclusive dealing and exclusive territories provisions of the contract it already had. Tr. 362-66, 1164-65, 1327-29.

exclusive dealing contracts limited interbrand competition or that competitors could not enter market through other distributors), *aff'd in part, rev'd in part on other grounds*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). Eden has failed to meet that standard here. Although it is possible that some level of foreclosure exists in the market for accessories such as water reclaim unit, Eden has not demonstrated that this foreclosure is in any way "substantial." [19] The evidence of foreclosure was not sufficient to create an issue of fact for the jury. Accordingly, the District Court erred in denying Ryko's motion for judgment notwithstanding the verdict on Eden's exclusive dealing claim.

Tying

Eden's final antitrust claim is that Ryko tied sales of its water reclaim device to sales of rollover car-wash machines in those sales for which a water reclaim system was required. This claim clearly fails because Eden's evidence does not demonstrate that Ryko ever forced con-

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[19] Eden suggests that approximately 63% of its car-wash machine sales during 1982 and 1983 required a reclaim. Because this percentage is based on Eden's sales of Ryko rollover equipment, we have no way of knowing what percentage of the total car-wash market requires a reclaim system. Moreover, the "one-stop shopping" argument clearly applies only to buyers who purchase the accessories as original equipment. Buyers who decide to purchase additional equipment to upgrade previously installed car-wash machines—for example, a water reclaim purchased to comply with a newly enacted local ordinance—are free to purchase such accessories from manufacturers who do not offer a full line of equipment. In addition, Eden's testimony confirms that local regulations increasingly require reclaim systems. Tr. 1773. To the extent that this regulatory trend affects existing wash sites, the demand for separately purchased reclaim units can be expected to increase. This would, in turn, decrease the relative level of foreclosure in the entire market caused by foreclosure with respect to original equipment buyers. In these circumstances, there is insufficient evidence from which to conclude how much of the accessory market, if any, is actually foreclosed.

sumers "into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). The sole foundation for Eden's tying claim is a letter from Ryko to Eden which states that "any RYKO car wash equipment ordered to be installed in your territory cannot be supported by Eden water reclaim equipment sold by you." Ex. 76. One of Eden's witnesses also testified that Ryko had implemented the statement contained in the letter. Tr. 1249.

This evidence plainly is insufficient to establish an illegal tying arrangement. The statement clearly does not suggest that Ryko conditioned the sale of its rollover equipment upon either Eden's or the customer's purchase of a Ryko water reclaim device, but merely restates Eden's obligations under the exclusive dealing provisions discussed above. Neither Eden nor any of its customers are required to purchase a Ryko reclaim device in order to purchase a Ryko car-wash machine, and thus the challenged arrangement fails to meet the basic definition of a tying arrangement. *See Northern Pacific Ry. v. United States*, 356 U.S. 1, 5-6 (1958); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n.*, 666 F.2d 1130, 1140 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982). Customers were free to purchase a car-wash machine or water reclaim from Ryko and to purchase the other item separately from any other manufacturer. *See Northern Pacific*, 356 U.S. at 6 n.4. Eden merely was bound by its contractual obligation as a Ryko distributor not to promote or sell products that competed with Ryko products.

Eden refers us to *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), and the suggestion in that case that conditioning the lease of a service station to a franchisee upon the franchisee's

agreement to purchase gasoline solely from the franchisor might constitute a tying arrangement. *Id.* at 452. Whatever the merits of this suggestion, we find *Bogosian* inapplicable here. Car-wash equipment is sufficiently differentiated to justify a manufacturer's concern for the quality of accessory products sold in conjunction with its equipment. *Compare id.* at 453 (noting apparent fungibility of gasoline of similar octane rating); *see also* Austin, *The Tying Arrangement*, 1967 Wis. L. Rev. 88, 115-16. Moreover, as noted in *Jefferson Parish*, "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." 466 U.S. at 16. Because Ryko's customers are free to shop elsewhere for a reclaim device, any "forcing" found here would affect only Ryko's distributors, and as we have already noted, the non-compete provisions of Ryko's newer distributorship contracts are substantially less restrictive than Eden's. Although we believe it is apparent that Eden has not demonstrated such forcing, it is absolutely certain that Eden has not shown that "a substantial volume of commerce" would be foreclosed if the requisite forcing were shown. *See id.* In these circumstances, a jury could not reasonably conclude that a tying arrangement existed. We therefore hold, as we already have held with respect to Eden's other antitrust claims, that the District Court erred in denying Ryko's motion for judgment notwithstanding the verdict on Eden's tying claim.[20]

FRAUD

Eden pursued several common law fraud theories at trial, and in a special interrogatory the jury found that

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[20] Our disposition of the antitrust claims necessarily requires a reversal of the District Court's award of attorney fees to Eden under Section 4 of the Clayton Act.

Ryko had defrauded Eden.[21] Because we have no way of knowing which of the fraud theories the jury relied upon in rendering its verdict, each of the theories must be supported by sufficient evidence to create a jury question on that theory. If the evidence with respect to any of the theories is insufficient to make a submissible case as to that theory, we must set the fraud verdict entirely aside. *See Dudley v. Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986) (citing cases) ("The rule in this circuit is clear that when one of two theories has erroneously been submitted to the jury, a general verdict cannot stand."); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 518-19 (5th Cir. 1985) (reversal of general verdict for plaintiff on common law fraud claim required where necessary element of proof was lacking in connection with one of six alleged misrepresentations); *compare Hinkle v. Christensen*, 733 F.2d 74, 76 (8th Cir. 1984) (contrary rule where jury renders specific findings on submissible claims).

Under Iowa law, there are five distinct elements in an action for fraud: "(1) a material misrepresentation (2)

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[21] Eden claims that Ryko made fraudulent misrepresentations to Eden in five different respects:

> (1) That Ryko was committed to building a strong network of distributors;
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> (2) That Ryko would not establish competing distributors in Eden's territory;
>
> (3) That Eden could market and install non-Ryko water reclaim systems;
>
> (4) That Eden could sell, install and service Ryko equipment in Virginia; and
>
> (5) That the distributor price for Ryko products [would] allow a 30% margin for the distributor.

Jury Instruction 14. Special Interrogatory 4, which the jury answered in the affirmative, asked simply whether Ryko had defrauded Eden. The Interrogatory makes no reference to and requires no findings regarding any of the individual theories of fraud. The fraud verdict thus is a general verdict, even though it took the form of an answer to a special interrogatory.

made knowingly (scienter) (3) with intent to induce the plaintiff to act or refrain from acting (4) upon which the plaintiff justifiably relies (5) with damages." *Beeck v. Kapalis*, 302 N.W.2d 90, 94 (Iowa 1981). Moreover, the plaintiff must establish these elements by a "preponderance of clear, satisfactory and convincing evidence," *Omaha Bank for Cooperatives v. Siouxland Cattle Cooperative*, 305 N.W.2d 458, 463 (Iowa 1981). This heavier evidentiary burden "is mandated in fraud actions by the presumption of fair dealing accompanying a transaction." *Sedco International, S.A. v. Cory*, 522 F. Supp. 254, 322 (S.D. Iowa 1981), *aff'd*, 683 F.2d 1201 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982). Under this standard, the evidence on at least three of Eden's fraud claims was insufficient to submit those claims to the jury.

Eden's claim that Ryko fraudulently misrepresented its intent regarding the establishment of competing distributors in Eden's territory is wholly unsupported by the evidence. Eden's 1977 distributorship contract includes a provision in which Ryko agrees that for the duration of the contract, "no other or different firm or corporation will be granted the privilege of selling [Ryko's] products in the [distributor's assigned] territory." In 1983, Ryko contracted with Texaco TBA, a corporation selling accessory equipment to Texaco Oil Company service station dealers, to become an approved supplier for the Texaco TBA program. Under the program, Ryko sells equipment to Texaco TBA for resale to individual Texaco dealers. Texaco Oil Company apparently provides some financial assistance to dealers in purchasing equipment from Texaco TBA, but Ryko deemed it necessary to provide Texaco TBA an additional discount below standard NAP pricing in order to become an approved supplier for the TBA program. The additional discount was absorbed jointly by Ryko and its distributors. Otherwise, the commission structure closely resembled the NAP, with the distributor receiving a commission on each machine

sold by Ryko to Texaco TBA for installation in the distributor's territory. Eden's complaint thus is not that it received no commission on TBA sales. Rather, Eden complains that the profits earned by Texaco TBA (on its resale of the equipment to individual Texaco dealers) demonstrate that Eden could have received greater commissions by making sales directly to the dealers.

Viewing the evidence most favorably to Eden, and assuming *arguendo* that the Texaco TBA program constitutes a violation of Eden's exclusive distributorship, we find nothing in the evidence even remotely suggesting that Ryko knew its representations regarding Eden's exclusivity were false at the time they were made or that Ryko never intended to honor the exclusivity provision. Eden simply invited the jury to speculate that Ryko's alleged breach of the distributorship contract—in establishing a "competing" distributor in 1983—demonstrates its fraudulent intent in securing Eden's agreement to the 1977 contract. Under Iowa law, such speculation is plainly impermissible.

The evidence supporting Eden's claim of fraud regarding its right to sell, install, and service Ryko equipment in northern Virginia suffers from a similar defect. The evidence shows clearly that Eden's original territory did not include the counties in northern Virginia to which Eden now asserts an exclusive distributorship right. Ex. 3, L-6; Tr. 585, 708, 1114, 1296, 1467. With Ryko's approval, Eden reached a separate agreement with the Virginia distributor regarding the territory, but the continuing validity of that arrangement was brought into doubt by the termination of the Virginia distributor in 1980. Over the next two years, the parties attempted to come to an accommodation regarding the territory and eventually reached an agreement in April 1982. The agreement granted Eden the right to perform some distributor services in specified Virginia counties. For reasons that are disputed, the agreement never was honored.

Whether this agreement effectively modified the parties' prior contract and whether the agreement subsequently was abandoned by one or both of the parties because of the other's nonperformance were questions for the jury. In any case, Eden presented no evidence, direct or circumstantial, from which a jury reasonably could conclude that Ryko misrepresented its intent to honor either the allocation of territories in the original distributorship contract or any subsequent agreement regarding Eden's right to distribute in northern Virginia. The evidence shows only that an extensive contract dispute arose between the parties, and that the dispute included a sharp disagreement over the scope of Eden's territory. That the jury ultimately rejected Ryko's position regarding Eden's contractual rights does not, without more, support an inference that Ryko acted with fraudulent intent. *Cf. Iconco v. Jensen Construction Co.*, 622 F.2d 1291, 1304 (8th Cir. 1980) (contractor's unsuccessful dispute with SBA over contractor's status as small business does not support inference that contractor fraudulently certified itself as small business in bid for contract).

Finally, Eden claims that Ryko fraudulently misrepresented the margin of return on sales that Eden would earn as a Ryko distributor. This claim similarly lacks evidentiary support. The record shows that Ryko had a legitimate dispute over pricing with Eden, with much of the dispute arising from Eden's refusal to sign an updated version of the distributorship contract, which includes new pricing provisions. Eden's 1977 contract provides explicit prices on only two Ryko machines, and Ryko no longer manufactures either machine. The contract further specifies that Eden's price for all other Ryko equipment "shall be retail price (as per current price list) less 30%." Eden convinced the jury that this provision guarantees Eden the right to purchase Ryko equipment at the NAP price less 30%, rather than at the suggested retail price to non-NAP purchasers less

30%. We doubt that the jury's finding accurately reflects the intended meaning of this contractual provision, but the provision is ambiguous and we are unable to conclude that the jury's finding is based on insufficient evidence. However, Eden presented no evidence that Ryko knowingly encouraged Eden's contrary interpretation of the provision while intending to apply its own, or that Ryko possessed any intent to defraud Eden when agreeing that Eden's margin on sales of Ryko equipment would always be approximately 30%. Tr. 1110-11. Therefore, as in the case of the two fraud theories previously discussed, Eden did not make a submissible case on this theory of fraud.

Eden's two remaining fraud claims, regarding Ryko's commitment to a strong distributor network and Eden's right to develop and market a water reclaim device, rest on very thin evidence, but we cannat say that they are so lacking in evidentiary support as to justify removing them from the jury's consideration. Nevertheless, as noted abcve, the rule in this Circuit requires in these circumstances that we set the fraud verdict aside, and remand for a new trial on both liability and damages with respect to the two theories of fraud that properly were submitted. *Dudley*, 795 F.2d at 673-74.

BREACH OF CONTRACT

Eden's counterclaim also charged Ryko with breach of the distributorship contract, and the jury rendered a verdict in Eden's favor. We have discussed the evidence supporting two of Eden's theories of breach in connection with the fraud counterclaim. As observed above, the claims regarding the establishment of the Texaco TBA program and the parties' intent regarding pricing structure under the 1977 distributorship contract presented issues of fact for the jury. Although we may disagree with the verdict, we are not free to substitute our view of the facts for the jury's unless the only reasonable con-

clusion from the evidence is contrary to the conclusion the jury reached. *See Northwestern National Ins. Co. v. Pope*, 791 F.2d 649, 652 (8th Cir. 1986). The evidence on these issues is conflicting, but is reasonably susceptible to the interpretation proffered by Eden.

Eden's third claim for breach of contract is that Ryko wrongfully terminated Eden. The sole justification for the termination urged by Ryko in this appeal is Eden's promotion of a competitor's car-wash equipment in violation of the exclusive dealing provisions of the distributorship contract. Eden admitted to having received inquiries from several of Ryko's competitors following the initiation of Ryko's original declaratory judgment action and to having provided some of its customers with information and price quotations on at least one competitor's equipment. However, Eden argued to the jury that such conduct was justified by Ryko's conduct, and did not amount to a market breach of the exclusive dealing provisions.

Under Iowa law, a breach must be material before it becomes a valid basis for unilateral termination of the contract by the non-breaching party, *see Beckman v. Carson*, 372 N.W.2d 203, 208 (Iowa 1985); *see also Maytag Co. v. Alward*, 112 N.W.2d 654, 660 (Iowa 1962), and materiality is an issue of fact for the jury. *Cf. Des Moines Blue Ribbon Distributors v. Drewrys, Limited, U.S.A., Inc.*, 129 N.W.2d 731, 736-37 (Iowa 1964) (whether distributor's performance under distributorship contract justified supplier's unilateral termination was issue for jury). In the present case, there was testimony from which the jury could find that Ryko anonymously solicited at least some of the competitive information from Eden, and that despite its contact with other equipment manufacturers, Eden continued to promote Ryko's products. This evidence provides a sufficient factual basis from which a jury reasonably could conclude that Eden's conduct did not constitute a material

breach of the distributorship contract and that Ryko's termination of Eden therefore was itself a material breach of the contract.

Although we find that each of Eden's contract claims was supported by sufficient evidence, we cannot simply affirm the jury verdict for Eden on these claims. The jury awarded Eden damages only on its antitrust claims; our reversal of the judgment entered with respect to those claims leaves Eden without any recovery for its successful contract claims. In such circumstances we normally would remand the contract claims to the District Court for a new trial solely on the issue of damages. *But cf. McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1382 (8th Cir.), *modified on reh'g*, 722 F.2d at 1388-89 (8th Cir. 1983) (requiring retrial of liability and damages on fraud claim where issues of liability and damages were inextricably intertwined), *cert. denied*, 469 U.S. 870 (1984). The circumstances of this case, like those in *McDonald*, demand a departure from our normal procedure.

The amount of Eden's recovery on its contract claims depends upon the precise nature of its distribution rights in northern Virginia. Ryko premised its own breach of contract claim against Eden in part on the assumption that Eden had no distribution rights whatsoever in northern Virginia. The jury rejected this assumption when it rendered its verdict that Eden had not breached its contract with Ryko. However, that verdict tells us nothing about the nature or the scope of the distribution rights the jury recognized. If the April 1982 agreement modified the existing contract provisions covering northern Virginia, then Eden's damages for breach would be significantly different than under the original 1977 distributorship contract, or under any side agreement with the Virginia distributor to which Ryko succeeded. This differential has an impact not only on the measure of Eden's lost commissions on Virginia sales, but on the

recovery for Eden's claim that Texaco TBA was a competing distributor operating in its exclusive territory.

In this case, the measure of damages is completely intertwined with the issues of liability, and we are not free to sever the two issues and to order a new trial limited solely to determining Eden's damages. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 499-500 (1931). A trial on damages alone would require essentially the same evidence as a trial on both liability and damages, *see Colonial Leasing, Inc. v. Logistics Control International*, 770 F.2d 479, 481-82 (5th Cir. 1985), and necessarily would require the jury to draw conclusions about the substantive nature of the parties' contractual agreements in northern Virginia. *See Gasoline Products*, 283 U.S. at 499-500. As a result, the interest of judicial economy would not be served by limiting the retrial to damages.

Moreover, our concern for fundamental fairness leads us to favor a complete retrial of Eden's contract claims. Our extensive review of the record convinces us there is a substantial likelihood that the jury's consideration of the contract claims improperly was influenced by Eden's evidence and arguments on its antitrust claims. In rendering its antitrust verdicts, the jury necessarily concluded that under the antitrust laws Ryko could not enforce some of the key provisions in Eden's distributorship contract. That the antitrust verdicts—which for the reasons set forth earlier in this opinion cannot be allowed to stand—influenced the jury's decision regarding Eden's contract claims seems to us inescapable. This further supports our decision to remand the case for a new trial of the entire issue of Ryko's liability for breach of contract. *See Eximo, Inc. v. Trane Co.*, 748 F.2d 287, 290 (5th Cir. 1984) (affirming district court's grant of new trial on distributor's contract claims, where district court believed jury was influenced by evidence on antitrust claims upon which directed verdict was granted), *modifying*, 737 F.2d 505, 513-14 (5th Cir. 1984). We there-

fore set aside the verdict for Eden on its contract claims and remand for a new trial on both liability and damages with respect to those claims.

CONCLUSION

To summarize, we hold that Eden's antitrust claims against Ryko are not supported by sufficient evidence and that the District Court therefore erred in denying Ryko's motion for judgment notwithstanding the verdict with respect to those claims. Accordingly, we reverse the judgment entered on the jury verdict awarding Eden damages on its antitrust claims.

Second, we hold that three of Eden's five theories of fraud lack sufficient evidentiary support to create a jury question on those three theories. Because the jury in effect rendered a general verdict on Eden's fraud claim, the entire fraud verdict must be set aside and the cause remanded for a new trial on both liability (with respect to the two remaining theories) and, if necessary, damages.

Third, we hold that the evidence supporting Eden's breach of contract claims is sufficient to support the jury's verdict for Eden on those claims. However, the jury did not determine Eden's damages with respect to its contract claims, and because the measure of damages on those claims cannot be separated from the substantive determination of Eden's contractual rights, we also must set aside the contract verdict and remand for a new trial on both liability and damages with respect to Eden's contract claims.

Fourth, our disposition of the case means that Eden is no longer entitled to attorney fees under Section 4 of the Clayton Act. We therefore reverse the District Court's award of attorney fees to Eden.

Finally, we dispose of Eden's motion on appeal challenging the length of Ryko's brief and the propriety un-

der our rules of certain exhibits attached as addenda to the brief. We grant the motion with respect to Ryko's Supplemental Addendum B, but in all other respects the motion is denied. We wish to stress that all counsel are expected to adhere to this Court's rules regarding the length of briefs submitted, *see* Fed. R. App. P. 28(g), and scrupulously should review their briefs for references to the record that, by inclusion or omission, might be misleading to the Court.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-70-E

RYKO MANUFACTURING CO.,
Plaintiff,

v.

EDEN SERVICES, a Maryland Partnership,
FRED J. EDEN and J. ERICK EDEN,
Defendants,

and

EDEN SERVICES, FRED J. EDEN, JR., and J. ERIK EDEN,
Counterclaimants,

v.

RYKO MANUFACTURING CO., JAMES A. NELSON
and JULIAN L. KLEIN,
Defendants to Counterclaims.

ORDER

The Court has before it several post-trial motions. A hearing was held on these matters on January 21, 1986 in Des Moines, Iowa. Counsel for both parties was present. The Court shall address each motion separately.

I. Ryko's Motion for Judgment N.O.V., or in the Alternative, New Trial.

Ryko has filed an extensive motion for judgment notwithstanding the verdict under Fed.R.Civ.P. 50(b) or, in the alternative, for a new trial under Fed.R.Civ.P. 59. The motions and the briefs attached are voluminous and this Court will not attempt to address each and every allegation of Ryko's in relation to these motions. In the motion for judgment n.o.v. and in the alternative motion for a new trial, the Court will proceed to evaluate said motions based on the following criteria.

The test for evaluating a motion for a judgment notwithstanding the verdict is as follows:

> It is well settled that the test of a judgment notwithstanding the verdict is that set forth in *Hanson v. Ford Motor Co.*, 278 F.2d 586 (8th Cir. 1960). Both the trial court and this court must (1) consider the evidence in the light most favorable to the prevailing party; (2) assume all evidentiary conflicts are resolved in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; (4) give the prevailing party the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) deny the motion if reasonable minds could differ as to the conclusion to be drawn from the evidence. . . . [A] verdict may be directed or a jury verdict overturned "only where the evidence points *all one way* and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Zoll v. Eastern Allamakee Community School District*, 588 F.2d 246, 250 (8th Cir. 1978).

Coleman v. Burlington Northern, Inc., 681 F.2d 542, 545 (8th Cir. 1982).

The standard for testing a motion for judgment n.o.v. is far different from the standard applicable to a motion

for new trial. *See, e.g., Russell v. United Parcel Services, Inc.*, 666 F.2d 1188 (8th Cir. 1981). The trial court clearly has wide discretion to grant a new trial following a jury verdict. Wright & Miller, *Federal Practice and Procedure*: Civil § 2531 (1971). Such discretion allows the trial court "to determine whether the verdict is against the clear weight of the evidence, or whether . . . a clear miscarriage of justice has occurred." *Seven Provinces Insurance Co., Ltd. v. Commerce and Industry Insurance Co.*, 65 F.R.D. 674, 688 (W.D.Mo. 1975) (cites omitted).

Ryko sets out in the first six paragraphs of its motion that the Court erred in not directing a verdict in favor of Ryko on its various claims. The Court carefully considered each of those motions at the time of the trial and each were then and are now overruled.

Ryko proceeds with its motion for new trial on page 5 and contends in ¶ 1 that the Court erred in admitting improper evidence of Eden's damages over Ryko's objections. The Court has carefully considered this contention and denies plaintiff's motion as to that point.

In ¶ 2 on page 6 of Ryko's motions, Ryko contends that the jury verdicts and answers to special interrogatories on Eden's damages were patently inconsistent, that the jury awarded Eden's claimed price-fixing damages on the tying arrangement verdict, that the jury awarded only one column of Eden's claimed price-fixing damages and, further, that the jury arrived at a number for exclusive territory damages which has absolutely no basis in either the record or in Eden's damage exhibits. Ryko further contends that the jury was confused and speculated on the damages.

The Court, in reviewing the verdict forms, finds that in answer to Special Interrogatory No. 8C, the jury awarded Eden the sum of $87,434.00 for Eden's price-fixing damages on the tying arrangement. The evidence is clear that

the prayer for said damages by Eden was the sum of $40,200.00. Thus, it is clear that the jury awarded $47,234.00 in excess of what Eden had prayed for in relation to this tying arrangement. The Court finds that the $47,234.00 awarded for said damages is excessive and not warranted under the pleadings, arguments heard by the jury, or the evidence presented in this case. The jury's award under Special Interrogatory No. 8C shall be reduced to the sum of $40,200.00. Since this is an antitrust claim which the Court trebled after the return of the jury verdict, this reduction will now have to be multiplied by three, which equals $141,702.00. The original verdict of $1,268,487.00 shall thereby be reduced by subtracting the sum of $141,702.00, leaving a difference of $1,126,785.00. The Clerk of the Court is directed to amend the judgment to show that the corrected judgment for the plaintiffs in this cause is $1,126,785.00 from the date of the filing of the judgment.

All other claims in ¶ 2, page 6, of Ryko's motions are without proper basis and are hereby overruled.

In ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of pages 6-9, Ryko contends that the Court erred in the giving of certain instructions primarily because there was insufficient evidence to permit the jury to so consider such propositions. The Court has reviewed each of these claims and they are each specifically denied.

On page 9 of Ryko's motion, under ¶ 16, Ryko contends that the Court erred in refusing each of the instructions requested by Ryko. The Court denies said contention and that portion of the motion.

In ¶ 17, Ryko contends that they objected to the form and content of the Special Interrogatories as given. The Court has not taken the time to fully explore that contention, but its recollection is that that portion of the Special Interrogatories was proposed by Ryko and accepted by Eden. However, if that is not a factual rec-

ollection of the situation, the Court is persuaded that said contention has no basis in law or in fact and said contentions are overruled.

In ¶ 18 on page 9, Ryko contends that the jury verdicts and interrogatories are inconsistent. The Court is not so persuaded and that paragraph of Ryko's motions is also denied.

II. Conditional Motion for New Trial by Defendants.

The defendants, the prevailing parties, have filed a conditional motion for a new trial pursuant to Rule 59 limited solely to the question of damages which "should" have been awarded on defendants' claim for fraud and breach of contract. In said conditional motion, the defendants concede that if the damage awards based on the antitrust counts are affirmed, there would be an insufficient basis for an additional award of damages on the contract and fraud claims. In the rulings on the antitrust claims, this Court has affirmed the antitrust awards (except for a reduction in the size of one of them relating to the "tying arrangement").

The defendants' conditional motion for a new trial is moot and will not be further considered at this point.

III. Ryko's Motion to Stay Execution of Judgment.

Pursuant to Fed.R.Civ.P. 62(b), Ryko moved the Court to stay execution of the judgment only until such time as rulings are entered on Ryko's motion for judgment n.o.v. or, in the alternative, for a new trial.

Since those motions have been ruled on in this order, Ryko's motion to stay execution is moot. The Court has also herein issued a ruling on the defendants' request for requirement of a full bond; said ruling will provide the basis for reconciling this problem during the pendency of the expected appeal.

IV. Prejudgment Interest.

The Court has considered the defendants' motion for an award of prejudgment interest and denies said motion. Title 15, United States Code, Section 15(a), allows an award of such interest if said award is "just in the circumstances." Some of the considerations are whether or not the losing party urged meritless claims, engaged in delaying tactics, acted in bad faith, or deliberately increased the cost of the litigation. This Court observed that this was a hard-fought cause; further, that while discovery procedures may not have been perfect, the Court is persuaded that the defendants have not met the burden required by the section on any of the above factors. No prejudgment interest shall be awarded.

V. Motion to Dissolve the Preliminary Injunction and Return the Bond.

The defendants have filed a motion praying that the Court forthwith dissolve the preliminary injunction and return to the defendants the bond that has been posted. At the hearing, the Court asked the parties to state their relative positions concerning this motion and was told by counsel for both parties that they felt they had this issue reconciled and they then requested time to present to the Court a stipulated order. Said proposed order was received by the Court, signed and filed, and is by reference made a part hereof.

VI. Attorney Fees.

Also before the Court is defendants' applicationn for attorney fees. At the hearing on this matter, it became apparent that defendants had not provided sufficient documentation relating to those fees requested by Dale A. Cooter. The Court therefore ordered defendant to provide the required documentation. Such documentation has not been forthcoming. As a result, the Court is not able to rule on attorney fees at this time. Defendants shall

have three days from the date of this order to provide the Court with such documentation.

VII. Motion for a Bond by Eden.

The Court is confronted with a dilemma. Eden has prevailed and the judgment is a large one. Ryko wants to appeal and requests that a stay be entered as allowed under Fed.R.Civ.P. 62(d). Eden demands that a large bond be set. Fed.R.Civ.P. 62 gives the Court some discretion. *See Trans World Airlines v. Hughes*, 515 F.2d 173, 175 (2d Cir. 1975); *see also, Dockendorf v. Dakota County State Bank*, 673 F.2d 961, 968 (8th Cir. 1981). Ryko, which was aggressive and unbending, is now saying please do not damage our company by setting a bond we cannot make. The Court held an extended hearing and is fully apprised of the situation. The Court is persuaded that Ryko cannot safely make a bond that would satisfy Eden or the basic intent of the rule.[1] The Court does not want to jeopardize Ryko's operations, but will leave that choice to Ryko. The Court will give Ryko the choice of agreeing to a "standstill order" and posting a bond of $150,000.00 now and an additional sum of $50,000.00 seventy-five days from the date of deposit of the original amount or Ryko may elect to post a bond without a "standstill order" in the sum of $300,000.00.

If Ryko elects the first alternative, the additional $50,000.00 shall augment the original sum to comply with the requirement that Eden is entitled to an equitable bond under the circumstances. If Ryko so elects, the "standstill order" shall be tailored to allow Ryko to operate relatively unscathed, but be unable to transfer or dis-

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[1] Although form and amount of supersedeas bond is not specified, amount of the bond may be computed so as to include the whole amount of the judgment, costs on appeal, interest and damages for delay.

J. Perez & Cia., Inc. v. United States, 578 F.Supp. 1318 (D.P.R. 1984).

sipate assets. In its response to Eden's Memorandum concerning Bond (Clerk's Memorandum of Papers No. 303), Ryko sets out certain things it will agree to do during the pendency of the appeal. This Court has adopted those, with certain necessary variations.

Ryko, if it accepts the choice given to it, will be enjoined from selling the company or any of the stock except by order of this Court; it will further be enjoined from paying any dividends, increasing the salaries of Mr. Klein or Mr. Nelson, awarding bonuses to those co-owners, making loans to said co-owners, or to any other insiders. Ryko will not be allowed to make any substantial capital improvements nor sell any substantial assets unless it makes application to this Court and said application is approved.[2] Ryko shall also maintain the value of its assets, pay its debt obligations and pay its suppliers and creditors in the same manner as it has heretofore. *See C. Albert Sauter Co. v. Richard S. Sauter Co., Inc.*, 368 F. Supp. 501, 520 (E.D.Pa. 1973).

If Ryko elects not to post the bond as set above and agree to the "standstill order," the Court will order the depositing of a bond in the amount of $300,000 forthwith.

IT IS THEREFORE ORDERED that plaintiff's motion for judgment n.o.v. be granted in part in that defendants' judgment shall be reduced to the sum of $1,126,785.00. The Clerk of this Court is directed to amend the judgment as of the date of the filing of the judgment.

IT IS FURTHER ORDERED that defendants' conditional motion for new trial be denied.

IT IS FURTHER ORDERED that plaintiff's motion to stay execution of judgment be denied.

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[2] This Court will not have jurisdiction of the merits of this action during pendency of the appeal but will be able to handle such a request for purposes of enforcing its order. *See Time Life Broadcast Co. v. Boyd*, 289 F.Supp. 219 (S.D.Ind. 1968); Fed.R. App.P. 3.

IT IS HEREBY ORDERED that Ryko shall make its choice of bond known to the Clerk of this Court in writing within three days of the entry of this order and shall post the chosen bond as set out above within 24 hours thereafter.

IT IS FURTHER ORDERED that defendants' motion for prejudgment interest pursuant to 15 U.S.C. § 15(a) be denied.

IT IS FURTHER ORDERED that defendant shall submit proper documentation concerning hours worked on this case by Attorney Dale Cooter within three days of this order and that thereafter this Court will promptly award attorney fees so as not to delay these proceedings. If said documentation has not been received within said three days, no fee request for Cooter's work will be considered.

February 11, 1986.

/s/ Donald E. O'Brien
DONALD E. O'BRIEN
Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1312/1393-SI

RYKO MANUFACTURING CO.,
Appellant,

vs.

EDEN SERVICES, ETC., *et al.*,
Appellees.

Appeals from the United States District Court
for the Southern District of Iowa

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

August 17, 1987

/s/ Robert D. St. Vrain
Clerk
United States Court of Appeals
Eighth Circuit

APPENDIX D

PLAINTIFF'S EXHIBIT 1

EXCLUSIVE DISTRIBUTORSHIP CONTRACT

THIS AGREEMENT made in duplicate this 12 day of June, 1977, by and between EDEN SERVICES, hereinafter referred to as "Distributor", and RYKO MFG. CO., a corporation organized and incorporated under the laws of the State of Iowa, hereinafter referred to as the "Company",

WITNESSES THAT

I. *EXCLUSIVE DISTRIBUTORSHIP.*

Company hereby grants to Distributor the exclusive distributorship to sell Company products within the following described territory STATE OF MARYLAND AND DISTRICT OF COLUMBIA.

A. It is further hereby agreed that Company may not at any time reduce, or otherwise change said territory unless mutually agreed to by both parties to this agreement. Distributor hereby accepts the above exclusive distributorship to sell Company's products in said territory and agrees to make all sales hereunder in accordance with this agreement. Distributor further agrees to work and develop the aforementioned territory and not to sell any "Company Products" outside thereof.

B. Company agrees that for so long a time as Distributor shall continue to sell Company's products and while this agreement shall be and remain in effect, that no other or different firm or corporation will be granted the privilege of selling the same products in the aforesaid territory.

C. The Company further agrees that it shall permit no sale of Company's products within the terri-

tory by mail or otherwise except those sales which are credited to the account of the Distributor for the term of this contract.

II. *COMPANY DUTIES AND RESPONSIBILITIES.*

A. The Company shall be required to forward to Distributor copies of all inquiries originating in said territory concerning Company's products.

B. Company will furnish Distributor with descriptive information specifications, and sales aids as they are available from the Company, for the purpose of helping the Distributor to carry out Distributor's duties under this contract and in reasonable quantities. Aforementioned literature will be available to the Distributor at not more than the cost to the Company of said literature and sales aids.

C. The Company reserves the right to determine the proper marketing methods for any of Company's products and shall be responsible for all national and international marketing efforts.

D. The Company warrants that all goods sold by it to the Distributor shall be free from all defects of workmanship or materials for a period of one year. Items returned to the Company for warranty are to be shipped prepaid. A credit memo will be issued when the item has been inspected and warranty credit allowed. Labor costs involved in parts that are replaced under warranty shall be those of the Distributor.

E. Upon receipt of a Purchase Order, accompanied by a 10% deposit, Company will issue a date upon, or before which the ordered goods will be shipped. Such shipment shall be made to the Distributor either at his place of business as set forth in this agreement or at any other place within the ter-

ritory and any other person, firm or corporation designated by the Distributor.

F. The Company shall not be responsible for non-delivery of products due to delay of parts caused by strikes, lockouts, fires, non-deliveries of raw materials by mills, etc., or any other conditions beyond Company's control. No return of merchandise is accepted without Company's previous consent in writing.

III. *DISTRIBUTOR'S DUTIES AND RESPONSIBILITIES.*

A. Distributor agrees to exert its full capacity to sell and promote the Company's products throughout the exclusive granted territories.

B. Distributor agree to employ and train a staff capable of selling and servicing Company's products.

C. Distributor agrees to pay Company for all purchases within 30 days of the date of invoice. All invoices paid later than 30 days of the date of invoice shall be subject to a finance charge of 1½% per month.

D. Distributor shall not, during the period of this contract, sell or promote any product which is competitive with Company's products. Distributor shall not for a period of one year following the termination of this agreement manufacture and sell or offer for sale in the territory described herein any of the products manufactured by the Company or of the same concept or design as of the date of the termination of this agreement.

E. Distributor shall furnish to Company a complete list of the names and addresses of all buyers of Company's products.

F. Distributor shall have the sole and complete responsibility for the collection of all its accounts and no delinquencies therein shall affect Distributor's duty to pay Company.

G. Distributor shall meet all insurance requirements of the Company, Federal, State and local governments, and also those required by the customer, if any. Under no circumstances shall the Company be responsible for damage, liability or injury caused or suffered by the distributor or any of its employees, customers, invitees or any other parties whatsoever and the Distributor shall hold the Company harmless from any expense or liability therefor except for those injuries and claims caused by the negligence of the Company. Company requiremetnts are as follows: 1. Liability, $300,000 2. Bodily Injury, $50,000 3. Property Damage Insurance to cover installation work. 4. Also recommend broad form property damage insurance. (Company must have in its possession copies of Distributor's Insurance Coverage).

H. Distributor shall collect and be responsible for payment for all State Sales and Use Tax requirements resulting from the sale of Company products within the Distributor's state boundary. Distributor is to provide Company a copy of State Retail Sales Tax Permit.

I. Distributor shall be responsible for the proper installation and service of all Company products delivered within their exclusive territory. Failure to respond adequately to customer initiated service requests shall be cause for termination of this contract.

J. Distributor shall purchase a minimum of $250.00 in Company parts with each of their first two (2) orders and shall, from the time of delivery of the

second order, maintain a minimum inventory of $500.00 in Company parts.

IV. *PRICE AND CREDIT STRUCTURE.*

A. Company agrees to sell following listed items to Distributor at indicated prices:

1. RYKO MODEL IV ..... $ 9,500.00
2. BYKO MODEL V 10,200.00

B. Distributor price on all other Company goods shall be retail price (as per current price list) less 30%.

C. Price of all Company goods are quoted as F.O.B. factory.

D. Company reserves the right to change the price of any or all of its products upon 30 day notice.

E. Pricing structures for all major oil companies and national accounts shall be determined by the Company. Accounts may be declared national accounts at the Company's discretion.

F. Orders for and shipment of all Company goods shall be handled in the following manner:

1. Orders for all goods shall be submitted on a purchase order and sent to the Company for approval.

2. Each order shall be accompanied by a minimum 10% deposit. Deposits are not required for orders of parts and supplies unless the order is over $1,000.00. Customer refusal of goods, beyond 30 days of delivery date will result in forfeiture of the deposit.

3. Each order shall specify the shipping destination of the goods ordered.

4. Upon acceptance of the order by a Company Representative, a shipping date will be assigned

and a copy of the order, approved and with the shipping date on it, will be sent to the Distributor.

5. Goods ordered by the Distributor will then be shipped to the specified destination on or before the given shipping date.

6. All approved orders of $1,000.00 or more will be shipped on a sight draft.

G. Purchase orders issued from major oil companies or national accounts headquarters will be issued in the name of the Company and shall be sent directly to the Company.

H. Purchase orders issued from major oil companies or national accounts headquarters shall not require a deposit and goods concerned will not be shipped on a sight draft.

I. Billing of purchase orders issued by major oil company or national account headquarters will be handled by the Company. Commissions on said accounts will be paid to the Distributor upon collection of the purchase order price.

J. Commissions to Distributors on sales to major oil companies or national accounts will be paid only if delivery and installation of the goods in question are made within the Distributor's aforementioned exclusive territory.

V. *TERMINATION PROVISIONS.*

A. Either party may terminate this agreement upon written notice effective immediately in event of any of the following occurring:

1. Either party defaults in the performance of any of the terms or conditions of this contract.

2. Either party is adjudged a bankrupt or makes a general assignment for the benefit of creditors.

B. Distributor shall be subject to termination in the event that Distributor's sales volume does not reach $15,000.00 per yearly quarter or $30,000.00 semi-annually.

C. Upon termination of this contract, Distributor shall immediately return to the Company all sales and promotional equipment, supplies, literature, manuals, aids and data of all kinds and nature, pertaining to the Company's product. This will be done at Distributor's expense and credited to Distributor's account from the final billing.

D. Company shall prepare a final statement supported by invoices and distributed to Distributor by regular mail. Distributor shall pay such statement within 30 days of its receipt of such final statement.

VI. *GENERAL PROVISIONS.*

A. The failure of either party at any time to require performance by the other party of any provision hereof shall in no way affect the full right of such performance at any time thereafter nor shall the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of any succeeding breach of the sale or any other provision herein or as a waiver of the provision itself.

B. It is agreed that this agreement does not constitute the Distributor, the agent or legal representative of the Company for any purposes whatsover. Distributor is not claiming any right or authority to assume or create any obligation or responsibility, expressed or implied, on behalf of

the name of the Company of to bind Company in any manner or thing whatsoever.

This agreement is to be governed by the laws of the State of Iowa. This agreement is not valid or binding until or unless executed by the President or duly authorized executive officer of RYKO Mfg. Co. and the Distributor.

EDEN SERVICES

By /s/ Fred L. Eden
Title President

RYKO MFG. CO.

By /s/ Larry Klein
Title President

APPENDIX E

[FROM TRIAL EXHIBIT M]

AMOCO

Amoco operates using somewhat autonomous regions. Each region *may* be unique or *may* operate the same. In most instances the following will apply.

ORDERING:

Equipment purchase will be authorized via approved written purchase orders from the appropriate Amoco regional office. In some instances equipment purchaser will be authorized by a signed equipment order with the appropriate deposit. This instance usually occurs when Amoco is assisting their dealer in the purchase of their equipment, but that particular region does not issue purchase orders. Normally, equipment will be quoted as delivered and installed.

INVOICING:

After the distributor submits to RYKO a signed Amoco Certification of Delivery and Installation, RYKO will submit an invoice to Amoco for equipment, installation, unloading, and freight. In the instance where Amoco does participate in the purchase but does not issue a purchase order, RYKO will invoice the distributor for the appropriate amount, and the distributor will be responsible for invoicing and collecting payment from the dealer.

PAYMENT TERMS:

For Amoco purchase orders—Net 30 days upon receipt of invoice.

For Amoco participation without purchase order, payment terms will be variable.

SALES TAX:

Invoices to Amoco will indicate "All sales/use tax sole responsibility of purchaser." In the instance where RYKO invoices the distributor, the distributor is responsible for collecting sales tax from the dealer. Invoice will indicate "All sales/use sole responsibility of purchaser."

COMMISSION REBATE AMOUNT: Per price sheet A

[FROM TRIAL EXHIBIT K]

DATE: March 28, 1979

SECTION: Pricing Policies

SUBJECT: National Account Pricing and Procedures

RYKO Manufacturing Company shall, at its discretion, declare certain accounts as national accounts. The criteria for establishing a national account, with open account billing privileges, will vary with the nature of the applicant. If the applicant is an oil company with refining capacity and large scale distribution, they will be considered, provided they are willing to make a significant commitment to RYKO to purchase in volume. Automobile rental companies with national exposure will be considered provided they are willing to make significant volume commitments to RYKO. Other firms may also be awarded this privilege at the discretion of RYKO, and in all cases applicants for this status must be deemed credit worthy. As will be restated again in this policy manual, the terms of sale to national account customers will be NET DUE UPON RECEIPT OF INVOICE. Customers so designated shall enjoy the volume pricing on certain RYKO products as listed in the company pricing policy. RYKO will accept purchase orders for merchandise from approved national accounts without a deposit. A purchase order properly prepared in the name of *RYKO MFG. CO.* and in the possession of the company will be sufficient documentation for the company to build and ship merchandise. *National account purchase orders will be prepared in the name of RYKO MFG. CO.*

The national account prices of RYKO Roll Over In Bay Car Wash systems are as follows:

RYKO Model R-584 $16,600.00

RYKO Model R-784 $17,600.00

This price does not include installation or modification of utilities within the location. The procedure for collection of payment from the national account customers will be that RYKO MFG. CO., upon shipment of the merchandise, will invoice the national account customer. The terms of RYKO MFG. sales to national account customers will be net due upon receipt of invoice. Upon receipt of payment from said accounts, RYKO will disburse to the distributor all funds of the transaction in excess of the distributor price for the same invoice. RYKO will apply funds to any past due balances owing the company prior to disbursing funds. Any sales in the exclusive territory of the distributor will be credited to that distributor.

There are specific exceptions to the above policy as it relates to national account pricing. These specific exceptions are detailed on a separate page of this policy section.

It should be noted that often times jobbers feel entitled to obtain national accounting pricing. The recommendations of RYKO MFG. CO. to alleviate this are as follows: If the jobber is desirous of national account pricing, he should obtain the parent company's permission to have a unit purchased on their national account purchase order, and he should reimburse the major oil company who purchases the equipment for him. Many jobbers and some investors request a national account price for multiple purchases. The decision to give this price rests with the distributor. RYKO MFG. CO. offers recommendations for this situation if the distributor desires to give them the quantity price.

1. The order should be for a minimum of 3 machines and they should all ship at the same time;
2. Sell the first car wash unit at full retail and the second unit to that customer at a price between

full retail and national account; then sell the third and any subsequent machines at national account prices;

3. Sell the first and second machines at full retail, sell the third machine at a price that would average the three machines to the national account price.

The above are only suggestions and examples of various plans that have been implemented at various times in the past. RYKO neither condones or discourages these practices.

DATE: March 29, 1979

SECTION: Pricing Policies

SUBJECT: Distributor Pricing

The distributor price for the RYKO In Bay Roll Over Car Wash Systems is as follows:

Model R-584 $11,950.00

Model R-784 $12,650.00

The distributor price for parts for the RYKO car wash systems shall be the retail price less 30%, unless specifically priced otherwise by an addition for change to company policy.

The distributor price of accessories or additional equipment to RYKO car wash systems shall be the retail price less 30%, unless specifically priced otherwise by an addition or change to company policy. Special factory modifications and changes is an example of a pricing situation where the 30% policy would not apply.

The distributor price for advertising supplies and services can be determined by referring to a price list of those items and services. The advertising supplies and services prices may change at any time, as their cost to RYKO is subject to immediate change. The need for 30 days notice of price change as stated in the distributorship contract is waived for advertising materials.

DATE: March 28, 1979

SECTION: Pricing Policies

SUBJECT: RYKO National Accounts

Imperial Refineries Corporation
Crown Central Petroleum Corporation
Phillips Petroleum Company
Amoco Oil Company
TEXACO, Inc.
Sunmark Industries
Gulf Oil Company
EXXON Company, U.S.A.
Mobil Oil Corporation
Getty Oil Company (Skelly)
Shell Oil Company
National Car Rental Systems, Inc.
Hertz Commercial Leasing Corporation
Avis
Jiffy Lube (prepaid or sight draft)
Derby Refining Company
National Convenience Stores (Stop & Go)

87-792

No.___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM , 1987

EDEN SERVICES, FRED J. EDEN, JR.,
and J. ERIK EDEN,

Petitioners,

v.

RYKO MANUFACTURING CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:
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Ahlers, Cooney, Dorweiler,
Haynie, Smith & Allbee
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Donald J. Polden
(Counsel of Record)
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(515) 271-2073

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that, as a matter of law, Ryko's national account program did not constitute resale price maintenance because (a) the uncontradicted evidence demonstrated that Ryko sells directly to national account customers and that, at best, Eden acts as Ryko's agent on national account sales, and (b) there was no evidence that Ryko conspired with anyone to fix resale prices.

2. Whether the per se rule should be applied to a vertical nonprice restraint where the manufacturer, who lacks any appreciable market power, performs distribution functions in some exclusive territories and distributors perform distribution functions in other exclusive territories.

RULE 28.1 STATEMENT

Pursuant to Supeme Court Rule 28.1, Ryko Manufacturing Co. states that it has one subsidiary, Ryko International Limited, and one affiliate, Business Management Technologies, Inc.

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OTHER AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. _____

EDEN SERVICES, FRED J. EDEN, JR. and

J. ERIK EDEN,

Petitioners

v.

RYKO MANUFACTURING CO.

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Ryko Manufacturing Co., hereby resists the petition for issuance of a writ of certiorari filed by Eden Services. This case does not present any novel or compelling

issues of antitrust law or policy and this Court's denial of certiorari would work no injustice to any party to this action. The Court of Appeals, in a unanimous opinion, rejected the arguments raised in Eden's Petition and Eden has failed to demonstrate any patent error in that opinion. Therefore, Ryko requests that the Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Eden's statement of the case and discussion of the proceedings below do not accurately reflect the condition of the record submitted to the Court of Appeals and that court's decision on appeal. Ryko notes, among others, the following significant errors in, and omissions from, Eden's statement of the case.

1. Ryko and the National Market for Car Washing Equipment. Ryko principally manufactures an automatic rollover car wash machine which competes with three other types of car wash equipment—tunnels, drive-thrus, and hand-held or wand—in a national market for car wash equipment. The jury in this case found that these four types of equipment compete with one another and together comprise the relevant product market. The evidence on the market share issue showed that Ryko possessed between 8%-10% of this car wash market, that there are over 60 manufacturers of car wash equipment in the United States, and that there are no substantial barriers to entry into the market. Tr. 1988, 2066; Ex. 92

Ryko is a small, closely-held corporation formed under Iowa law and which began its existence in April of 1973 out of a three-car garage in Bondurant, Iowa. Tr.73-74. Ryko's

success as a manufacturer and seller of car wash equipment is in large part attributable to the determination of its founders, Jim Nelson and Larry Klein, in designing a car wash capable of thousands of washes with a low breakdown rate and developing a strong and effective sales and service system. Tr. 83-88.

2. Ryko's Distribution System. Ryko distributes its car wash equipment and accessories through two channels—by direct sales to national account program customers and to its distributors for their resale. Tr. 85-88; 107-16; Ex. K. Two different sets of commercial documentation were designed to facilitate sales on the different transactions. Ryko's sales to national account customers were accomplished by the national account customer's issuance of a purchase order directly to Ryko, the receipt of which caused Ryko to construct the car wash machine.Tr. 164-8; 1602-3. Ryko submits the bill to and is paid by the national account customer after the machine is constructed, shipped and installed.Tr.164-71. On sight draft sales, Ryko's distributors send an order for equipment with a deposit to Ryko. Ryko then ships the equipment to the location designated on the order but the equipment cannot be unloaded until the sight draft has been honored. Tr.159-63; 1945.

The national account program was established by Ryko to stimulate sales of its car washing equipment in a very competitive market.[1] The national account customers, whose number has remained at 17 throughout the years, are principally national oil companies. Ex. 70, 78, 79, 80. Ryko's national account program has proven to be a successful tool for

[1]Judge Bowman, writing for the Court of Appeals in this case, carefully reviewed the operation of Ryko's national account program and the fundamental, yet distinguishing, characteristics of sight draft resales of equipment by Ryko's distributors. Pet. App. 3a-7a.

marketing car wash equipment to the oil industry and other large volume purchasers crossing distributors' territories, and, indeed, national account programs are utilized by other car wash equipment manufacturers. Tr. 1948. The program is useful in promoting price competition against other car wash equipment manufacturers because the oil companies purchase in quantity, either on a series or a single transaction basis, and they demand discounts. Tr. 80-8; 1050-69. Moreover, the national oil companies often required their vendors to offer national account programs because of the substantial involvement of the national or regional office in purchase and location of car wash equipment for their dealers throughout the country.[2]

Ryko has a network of distributors throughout the United States, but Ryko performs distribution activities in several territories with company employees. Ryko distributes directly in those territories for a couple of reasons: In some territories, like Iowa, Ryko has always performed distribution activities. In other territories, Ryko performs distribution activities because the distributors have quit or have been terminated for poor performance or have wished to be company employees, and Ryko has not found another distributors to service the area or has chosen not to replace those distributorships. Tr. 191-7. Ryko, however, at an early point,

[2]The large oil companies make purchasing decisions nationally or regionally. Tr. 677-86; 1046-54. These companies often own and lease or own and operate gasoline stations and they therefore have a significant interest in the types of materials, supplies and equipment used at or installed in their stations. The national oil companies have insisted on taking an active part in decisions regarding the types of supplies and equipment sold in those stations. Tr. 80-2; 683-6. These companies, through their national and regional offices, review and test available car wash equipment for installation at their stations. The companies often provide incentive and financing programs for the purchase of car wash equipment from approved suppliers and utilize their volume buying power to obtain discounts on such purchases. Tr. 1050-69.

determined that exclusive territorial arrangements are necessary to enable Ryko to compete more effectively against other car wash equipment manufacturers, and Ryko has implemented exclusive territories for its distributors. Ryko's employee-run territories are also subject to the territorial arrangements imposed on Ryko's distributors.

3. The Eden Services' Problem. Fred Eden became a Ryko distributor in 1977 and signed a standard distribution agreement granting him an exclusive territory in Washington D.C. and the State of Maryland. Over the years Eden has been an average (or at times, below average) distributor in terms of sales of equipment. Eden wanted to provide installation and maintenance service in the adjacent northern Virginia area, and, at Ryko's suggestion, an arrangment was worked out with the Virginia distributor.Tr. 707-9. Later, the Virginia distributor was terminated for poor performance and, when Ryko took over the territory, Eden insisted that it be given the northern Virginia territory. Ryko instead permitted Eden to service the northern Virginia area on an "as needed basis." Ex.8. However, Eden continued to dispute its right to exercise full distributorship rights in that area and the dispute precipitated hard feelings between Ryko officials and the Edens. Eventually, the contract dispute over distributorship rights to northern Virginia led to this action.

For several years, beginning in the late 1970's, Eden was toying with a water reclaim system applied to car wash equipment applications. Eden was marketing a jury-rigged Culligan water purification system and had discussed the possibility with Ryko of developing a total water reclaim system. Tr. 1468-69. At that time Ryko was developing such a system, which was completed in 1978. It was not until three years later, in 1981, that Eden completed its own reclaim system,Tr. 1345-8, and that is when the rub began. Ryko

requires its distributors to exclusively market only Ryko equipment and not distribute any competitive product. Eden was refusing to promote Ryko's reclaim and instead was promoting its own reclaim.

The parties finally reached an impasse when Eden, in direct contravention of the distributorship agreement, attempted to make a direct sale to a national account customer on an installation in northern Virginia and the proposal featured the Eden reclaim rather than the Ryko reclaim.[3] Ryko sought a declaratory judgment on the rights and duties imposed on Ryko and Eden pursuant to the agreement. Nearly a year later, Ryko attempted to terminated Eden as a distributor after it was discovered that Eden had been promoting rollover car washing equipment manufactured by a competitor, Bivens-Winchester, and after Fred Eden, a lawyer by training, lied under oath on two occasions that Eden never attempted to sell competitive equipment.

4. The Court of Appeals found, as a matter of law, that Ryko has not violated the federal antitrust laws. In its Statement of the Case, Eden contends that the Court of Appeals engaged in "extensive appellate fact-finding" but that its petition would address the legal implications of the decision. Petition at 6. Eden then spends the following three pages disputing largely factual matters found by the court of appeals. Ryko will respond to those factual arguments in the Argument section of this Brief in Opposition.

The Court of Appeals, in a unanimous opinion, agreed

[3]Eden's petition portrays the reason for its dismissal as stemming from Eden's price discounting on the Crown McLean transaction. Pet. at p. 5, 21. The uncontradicted evidence, however, shows that Eden was not terminated until one year after the Crown McLean transaction occured, that Ryko never complained to Eden about price discounting, and that the reasons for termination were, for the most part, Eden's sales of competitive equipment. Ex. 61.

with Ryko that neither its national account program nor its distributors' direct sales consituted resale price maintenance agreements. The court's multi-faceted holding concluded that Ryko's distributors were agents on national account transactions, that Ryko made sales directly to national account customers and there was no sale by Ryko followed by any conditioned or coerced resale by the distributor, and that there was an absence of any evidence that Ryko agreed or conspired with its distributors to fix resale prices.

The Court of Appeals also agreed with Ryko that its exclusive territorial provision was a reasonable restraint because Eden had failed to demonstrate any adverse effect on interbrand competition. The only evidence concerning potential competitive impacts was uncontradicted testimony that Ryko had about 8% to 10% of the market for car wash equipment. The Court of Appeals held, as a matter of law, that Ryko held an insufficient market share to demonstrate an adverse effect on interbrand competition.

The Court of Appeals also affirmed the district court's conclusion in this case that the territorial restraint employed by Ryko, which Eden contended was an illegal dual distribution arrangement, should be subjected to a rule of reason analysis. The Court of Appeals held that, even viewing the case as a situation involving dual distribution, there was no evidence of a dealer's cartel or other horizontal conspiracy which would warrant invocation of the per se rule.[4]

[4]The Court of Appeals, in concluding that the district court had failed to perform responsibly it duties in reviewing Ryko's motions for judgment nov and for new trial, also reversed the tying arrangement and exclusive dealing arrangement verdicts. Pet. App. at 38a, 40a. The appellate court sent back for a new trial some of Eden's breach of contract and fraud claims. Pet. App. 45a, 48a.

REASONS THE PETITION SHOULD BE DENIED

There are several important reasons why Eden's Petition should not be granted. In the first place, the Petition does not present any important issues of antitrust law or policy. The appellate court's opinion shows that the court performed precisely the type of analysis required by this Court decision in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). The Court of Appeals carefully sorted out the parties' arguments and examined in depth the real factual differences between purchase order transactions and sight draft transactions and between sales to national account customers and sales by distributors. From its analysis, the court drew real distinctions based upon uncontradicted facts in the record, and correctly concluded that Ryko had not engaged in resale price maintenance on any transactions.

The Court of Appeals conclusion that Ryko and its distributor could not, as a matter of law, agree or conspire to fix resale prices is not discordant with the decision of any other court. The court merely reaffirmed a longstanding rule that agents, like other employees, cannot conspire with their principals under section 1 of the Sherman Act. Moreover, the court correctly determined that there was no evidence that Ryko and its distributors agreed on any resale prices. In other words, the court's rulings on these points were neither novel nor in conflict with decisions in other circuits.

Finally, it is hardly surprising that the Court of Appeals refused to disturb this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), by ruling that dual distribution arrangements are per se illegal. There is a long and unvarying line of cases which hold that vertical non-price restraints imposed by a manufacturer, and which

are or resemble dual distribution arrangements, must be analyzed under the rule of reason, unless there is evidence of a dealers' cartel. These cases are rooted in the Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc,* and Eden has been unable to articulate a cogent necessity for reveiw.

ARGUMENTS

I. Neither Ryko's National Account Program Nor its Distributors' Sight Draft Sales Constitute Resale Price Maintenance

This case presents no issues governed by the Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Rather, Eden has attempted to create a conflict which does not exist. More importantly, the Court of Appeals properly applied the analysis required by this Court in the *Simpson* case in addressing Eden's claims that Ryko engaged in resale price maintenance.

A. The Intra-Enterprise Conspiracy Doctrine Does Not Conflict with the Court of Appeals' Ruling

Eden contends that the Court of Appeals mistakenly relied on *Copperweld* in holding that Eden's status as an agent for Ryko on sales to national account customers was incapable of conspiring with Ryko. Petition at 13. Eden claims that *Copperweld* was expressly limited to alleged conspiracies between parent corporations and wholly owned subsidiaries, and that the lower court's holding was in conflict with two other appellate court decisions. *Id.* at 14. Eden, however, reads both the *Copperweld* decision and the Court of Appeals' decision too narrowly. When properly read, there is no conflict between those decisions.

In *Copperweld* the Court recognized the rule that a corporation cannot conspire with its employees, officers and

directors. 467 U.S. at 769. As the Court noted, that rule has a long and uninterrupted history in the federal courts and its origin lies in the Sherman Act's proscription against combinations and agreements between two or more legally distinct "persons." *Id.* at n. 15 (collecting cases). The Court went on to decide whether a wholly owned subsidiary was capable of conspiring under the antitrust laws with its parent corporation.

The courts have recognized a limited exception to the rule that officers, directors and employees lack capacity to conspire with their corporation. Thus, an officer or agent's may have legal capacity to conspire with the corporation when the agent acts outside the scope of his or her authority as an officer or employee engages in anticompetitive conduct for his or her personal benefit. *See,e.g., Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313 (8th Cir. 1986); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1028-31 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979). This exception explains the cases cited by Eden as being in conflict with the Court of Appeals' decision. In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 880 (1987), the court held that Atlas and several of its carrier agents, who were also members of Atlas' board of directors and actual or potential competitors, were capable of conspiring with Atlas, notwithstanding the agency relationship, because each agent possessed "an 'indispensible personal stake in achieving the corporations's illegal objective'." *Id.* at 213, *quoting Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974). Similarly, in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986), the court held that the *Copperweld* rationale was inapplicable to a claim that a group of agents, acting together with the corporate principal, formulated a

horizontal conspiracy to fix prices and restrain competition.

In this case, the *Copperweld* decision was not even cited, much less applied, by the Court of Appeals. Moreover, it is clear that the lower court properly relied upon, and correctly applied, the consistently recognized rule that an agent lacks legal capacity under section 1 of the Sherman Act to conspire with its corporate principal.

B. The Court of Appeals Properly Rejected Eden's Formalistic Argument in Concluding that Eden Was an Agent on Sales to National Account Customers

Eden attacks the Court of Appeals' decision on another front, and argues that the court "turned *Simpson* on its head" and "failed to appreciate the central lesson of *Simpson*." Petition at 15,17. It is Eden, however, which fails to appreciate the lessons of, and the analysis required by, the *Simpson* decision, and it is equally clear that Eden's petition simply disagrees with the Court of Appeals' conclusion that Eden failed to present sufficient evidence to support its resale price maintenance claim.[5]

Eden's petition suggests that *Simpson's* proscription against resale price maintenance has some kind of special application to national account programs and cites to a few cases which have found resale price maintenance in the context of national account programs. Petition at 12. There

[5]Eden argues that the Court's decision in *United States v. General Electric Co.*, 272 U.S. 476 (1926) was effectively overruled in the *Simpson* case, and that the Court of Appeals' off-hand statement that *Simpson* "did not overrule *General Electric*" implies great significance to the Court of Appeals' handling of this case. Petition at pp. 14-15. Whether or not *Simpson* overruled General Electric is largely an academic "tempest in a teapot" and is not particularily important to the proper resolution of this litigation or to antitrust law generally. More importantly, irrespective of the Court of Appeals' reference to *General Electric*, it is clear that the court capably performed the analysis required by *Simpson*.

are, however, many cases in which the courts have found that national account programs do not constitute resale price maintenance, and in each case the court has performed the type of analysis required by *Simpson*. *See, e.g., Mesirow v. Pepperidge Farms, Inc.*, 703 F.2d 339 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983); *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806 (5th Cir.), *cert. denied*, 444 U.S. 836 (1979); *Pogue v. International Industries, Inc.*, 524 F.2d 342 (6th Cir. 1975). The Court of Appeals in this case, relying on those cases, performed the analysis required by *Simpson* and concluded that Eden's agency status precluded a finding that Ryko engaged in resale price maintenance.

In conducting the type of analysis required by the Court's decision in *Simpson*, the Court of Appeals closely examined the evidence presented at trial and the legal conclusions which followed uncontradicted facts in the record. In the first place, the court recognized that Eden's allegations of price fixing were limited to sales to national account customers; therefore, the court separately applied the *Simpson* reasoning to purchase order sales and to sight draft sales. Drawing this practical and realistic distinction is important, not only because it comports precisely with the realities of market transactions but also because Eden has consistently failed to recognize the instrumental significance of the two different types of transactions.

On purchase order transactions, the Court of Appeals examined many more factors than the three identified in Eden's petition[6] and found that those sales were made by Ryko

[6]Eden states that the Court of Appeal "highlighted" the fact that Eden did not warehouse machines, did not extend credit to national account customers, and that Ryko billed national account customers. Petition at 16. The court, however,considered other factors, including transportation responsibilities, allocation of risks between Ryko and its distributors, national promotional and marketing activities, and others. Eden's complaint merely

and not by Eden, and that Eden participated in no significant way as an agent. The conclusion that Eden functioned as an agent on national account sales is based upon uncontroverted facts in the record. First of all, the prices and terms of trade for car wash equipment were negotiated directly between Ryko and the national account customer's national or regional staff. Tr. 228-40; 260-5; 677-85; 1055. Eden did not participate in reaching either the price or terms of those sales. Second, machines were ordered directly from Ryko through purchase orders and the machines were shipped directly to the national customer at the receiving point designated by the customer. Tr. 235-42; 164-71; 452-3. In other words, Eden never had possession to the goods. Third, the machines were shipped FOB Des Moines, which means that title passed directly to the customer at the point were Ryko delivered the goods for transportation. Tr. 419. In other words, Eden never held title to the goods. Fourth, Ryko bore all of the risk that the customer would cancel the order for machines or that the machines would be damaged before shipment or installation. Tr. 164-71; 235-6. Eden never was at risk to any extent on those transactions. Fifth, Ryko sought "approved supplier" status from the national accounts, advertised Ryko products nationwide, solicited sales from national account customer, arranged for equipment to be used on a test basis by national account customers, and arranged for national customers to view Ryko products in operation prior to purchase. Tr. 231-4; 432-4. Finally, and most importantly, Ryko actively promoted and marketed its products to the national oil compa-

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underscores what is involved in this petition: Eden failed to produce real evidence that tends to show that Ryko coerced its distributors to resell Ryko car wash machines at prices dictated by Ryko.

nies and other national account customers.[7]

Contrary to Eden's contention to this Court, the Court of Appeals did not unfairly diminish Eden's risk taking on purchase order sales, nor did the court usurp the responsibility of the jury. It was clear on the record in this case that Eden had no significant risk taking on purchase order transactions to warrant a finding that they acted as independent business entities in making sales to national account customers. Eden's lack of any significant risk-taking also distinguishes Eden's situation from the distributor in *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), a case greatly touted by Eden. Unlike the uncontradicted evidence in this case, the supplier-distributor relationship between Greene and General Foods showed that there was a sale of goods by General Foods and a subsequent resale by Greene. 517 F.2d at 640. The supplier, as a part of the distributorship agreement, gave price lists which Greene was told to resell the goods for. *Id.* It was not disputed that Greene owned and held title to the goods. 517 F.2d at 641. The court also found that Greene stored the goods at his risk of loss and that the supplier had no appreciable risks in the transactions. *Id.* On these facts alone, the *Greene* case could not be more unlike this case, and the Court of Appeals clearly

[7]The national account sales were made as a result of continuous sales, promotional and advertising efforts by Ryko's Larry Klein and the sales force at Ryko. Ryko personnel attended trade shows, demonstrated equipment and transported customers to view Ryko equipment. Tr. 1972-6. Klein and other Ryko personnel routinely called on national account customer procurement personnel to promote Ryko products, iron out difficulties, and negotiate sales and buyer discounts. Tr. 187-8; 228-9; 677-86. Klein developed close contacts with national account customers by frequent visits to national and regional headquarters, arranging for product tests, and seeking to have Ryko placed on approved supplier lists. Tr. 964-6. Ryko also maintained a number of factory representatives who were spread out in geographic regions and who maintained contacts with regional or local offices of national account customers, promoted Ryko products, and assisted Ryko distributors in promoting and servicing Ryko products. Tr. 836-7.

did not err in concluding that Eden's was not an independent business entity on Ryko's purchase order sales to national account customers.[8]

Eden also claims that it proved resale price maintenance on eight transactions involving sales by sight draft to national account customers. Petition at pp. 4-5 & n.l. Eden made a similar argument to the Court of Appeals, which rejected the argument by concluding that the evidence did not, on its face, support Eden's claim.[9] First, the Court of Appeals found that because the sales were made by sight drafts they were not in fact national account sales. Pet. App. 22a. Therefore, the sales could have been made by Eden at any price it could obtain in the market. Further, the transactions did not involve sales to national customers; rather, the customers were local dealers who were making the car wash equipment purchases on their own account. Pet. App. 22a & n. 7. Most important, however, was the evidence that on several of these transactions, there were price quotations from Eden Services offering a discount off of national account

[8]Eden also relies on *Bostick Oil Co. v. Michelin Tire Co.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983), for the proposition that mandatory national account programs are illegal resale price maintenance. Petition at p. 15. In *Bostick Oil Co.*, however, the tire manufacturer sold the product to its distributors, including the plaintiff, and then attempted to condition the price at which the distributors resold the product. 702 F.2d 1211-12. In this case, because of the agency relationship between Ryko and Eden, there was no sale to Eden and no attempt by Ryko to coerce Eden into reselling machines at a specified price. Rather, as the Court of Appeals correctly concluded, the purchase order transactions involved sales and purchases directly between Ryko and the national account customers. Pet. App. 18a.

[9]In the Court of Appeals, Eden pointed to 19 transactions in which it claims to have made a resale which was subject to a price fixing arrangement. In this Court, Eden has narrowed the scope of its argument to 8 transactions in which it claims Ryko fixed resale prices. It is clear, however, that the Court of Appeals carefully reviewed all 19 transactions, including the 8 submitted to this Court to demonstrate appellate error, and concluded that they failed to present a jury issue on the presence of any price fixing scheme by Ryko. Pet. App. 20a-22a & nn. 6-7.

price. Ex. 93, V-7, W-7.[10] These sight draft transactions do not demonstrate a resale price maintenance arrangement by Ryko, and the Court of Appeals did not err in concluding that Eden produced insufficient evidence of any price fixing scheme.[11]

The Court of Appeals, after a careful consideration of the evidence presented at trial, was justified in concluding that Eden did not engage in sufficiently independent entrepreneurial activities on any transactions with national account customers to support a claim that Eden was not an agent. Rather the evidence clearly predominates in support of the finding that Eden functioned as an agent on those trans-

[10]In Appendix A to this Brief in Opposition, Ryko is including Ex. 93, a bid from Eden Services to Scott Trennor, a Jiffy Lube franchisee. This transaction relates to exhibits V-7 and W-7 cited by Eden as "completed national account sales" and introduced to show a resale price maintenance scheme. The Court should note: (1) that the transactions are not sales to a national account customer; it proposes sales to a franchisee of a national account customer; (2) that the "arrangements for the purchase are to be made by [Eden Services], rather than through Jiffy Lube, International"; (3) that the sale is accomplished by sight draft and not by purchase order; (4) that Eden was proposing a healthy discount off list price; and (5) that Eden was promoting its own reclaim system rather than Ryko's reclaim. Eden fails in its Petition to explain either how these transactions can be construed as evidence of a price fixing scheme or how competition policy is advanced by Eden's behavior.

[11]Eden's claim that the exhibits listed in footnote 1, pages 4-5 of the Petition show "completed national account sales" is simply not true. None of those exhibits shows a sale to a national account customer and none of the exhibits even shows the resale price charged the customer. Each exhibit is an invoice showing a sale to Eden, a shipment to a customer and Eden's equipment cost. One exhibit represents a sale by Eden to George Smith, Ex. G-6 and Tr. 1182, another represents a sale to Bob Christ Amoco, Ex. L-7, and a couple more represent sales to Scott Trennor, V-7 and W-7. Eden does not explain how these sales represent sales to national account customers. Indeed, Erik Eden testified to the difference between sales to a Jiffy Lube franchisee, such as Trennor, and a sale to Jiffy Lube, International, which was the national account customer for a while. Tr. 1416. The Court of Appeals was certainly justified in rejecting Eden's shifting and indistinct argument that these sight draft transactions were really the product of a resale price maintenance arrangement.

actions. The court's analysis follows the analysis required by *Simpson*. *See, e.g.*, *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986); *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313 (8th Cir. 1986); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983). *See generally*, VII Areeda, *Antitrust Law* ¶ 1473 (1986).

Perhaps the most compelling reason for denying Eden's petition for a writ of certiorari is the absence of any evidence that Ryko suggested, fixed, coerced or regulated in any way the resale prices for its equipment. The Court of Appeals held that Eden failed to sustain its burden of "'present[ing] direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Pet. App. at 22a, *quoting Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). Eden does not contend that this appellate finding is erroneous, and, even if the Court of Appeals erred in concluding that Eden was an agent on Ryko's national account sales, there is no evidence that Ryko fixed any resale prices. Pet. App. 22a-27a.

II. The Per Se Rule is Not Applicable to Ryko's Exclusive Territorial Arrangement

Eden also contends that Ryko's exclusive territorial provisions, which assign geographic areas to distributors, become a horizontal market allocation, and therefore per se illegal, merely because Ryko performs distribution activities in some territories. The Court of Appeals properly rejected Eden's argument because it comports with neither the facts of the case nor the prevailing case law. Pet. App. 28a-31a. There are ample reasons for rejecting Eden's argument.

First, all of the cases involving similar restraints

which have been decided since the Court's decision in *Contintental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) have held that the restraint should be characterized as a vertical nonprice restraint and apply the rule of reason. *See, e.g., Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified on other grounds,* 810 F.2d 1517 (9th Cir. 1987); *Abadir & Co. v. First Mississippi Corp.*, 651 F. 2d 422 (5th Cir. 1981). These rulings advance this Court's frequently stated admonition that commercial behavior should not be included in the category of per se offenses unless it becomes clear that the behavior "facially appears to be one that would always or almost always tend to restrict competition and decrease output. . ." *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1, 8-9 (1979). Ryko's internal operation of a handful of territories does not meet such a stringent standard for presumptive illegality.[12]

More fundamentally, Eden has failed to demonstrate any anticompetitive harm accompanying Ryko's operation of those territories and, in particular, to show that the effect is any different than the restriction of intrabrand competition accompanying the exclusive territorial arrangement. Ryko imposed the exclusive territorial arrangement on its distributors to compete more effectively against other car wash equipment manufacturers, Tr. 2082, and the exclusivity provisions operated against both distributors and Ryko employees. Therefore, there is no loss to intrabrand competition occasioned by the policy. Eden complains that it could not

[12]As pointed out in Eden's petition, there have been no decisions handed down since the *GTE Sylvania* case in which a court has applied the per se rule to a dual distribution arrangement. Petition at p. 19. This uniform trend reflects the importance of the judicial characterization of these restraints as vertical nonprice restraints rather than horizontal restraints. *See, e.g., H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 245-46 (5th Cir. 1978).

sell in Virginia after that territory was operated by Ryko employees; but the converse is true and the Ryko employees in Virginia cannot sell in Eden's territory. Thus, although there is still no intrabrand competition in either territory, *GTE Sylvania* requires a consideration of the effect on interbrand competition and Eden has failed to present any evidence of an adverse effect on interbrand competition stemming from the territorial arrangement. Indeed, Eden has not even appealed from the Court of Appeals decision that the territorial arrangement is not unreasonable.

It is also clear on the record in this case that Eden had no evidence of any horizontal agreement between Ryko and its distributors to allocate territories. A horizontal agreement to divide territories is necessary to invoke the per se rule. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). In this case Eden has conceded that the territorial provision in Ryko's distributorship contracts was "imposed on distributors by Ryko" and was not "the result of a distributors' cartel." Joint Appendix 335. Obviously, there is no horizontal agreement to divide territories.

Finally, Eden's citation to the Court's decision in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956) is perplexing. The issue in that case was "a narrow one of statutory interpretation" concerning the McGuire Act's exemption of certain price fixing agreements from the antitrust laws. 351 U.S. at 308-12. Not surprisingly, the Court held that the McGuire Act did not protect horizontal price fixing agreements. *Id.* at 313-14. In this case, as previously pointed out, Eden has conceded that there is no horizontal agreement to allocate territories and the *McKesson & Robbins, Inc.* case, which did not involve any nonprice restraints, provides no guidance in this case. *Cf.* Steuer, *Beyond* Sylvania: *Reason Returns to Vertical Restraints*, 47 Antitrust

L.J. 1007, 1017-20 (1978-79). Further, the so-called "fiction that Ryko acts only as a manufacturer when it agrees with other distributors to have exclusive territories", Petition at 20, is simply the result of the pragmatic analysis required by the Court in *GTE Sylvania. See Illinois Corporate Travel, Inc.*, 806 F.2d at 726. Again, there is no substance to Eden's claim of error in the Court of Appeals' decision and the evidence does not support Eden's arguments to this Court.

Conclusion

For the abovestated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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December 16, 1987

Appendix

EDEN SERVICES
2515 CHEROKEE STREET
ADELPHI, MARYLAND 20783

301 439-5566

September 24. 1982

Mr. Scott Trennor
Scott Lube, Inc.
8939 Tamar Drive
Columbia, Maryland 21045

Dear Scott,

Thanks very much for the down payment totalling $4,500 on the RYKO and E/S equipment for the Lanham Jiffy Lube store.

The following are summaries of the orders and prices for Lanham and District Heights:

LANHAM

Scott Lube, Inc., T/A Jiffy Lube
7571 Annapolis Road
Lanham, Mayland

RYKO $-785-2, 3 phase, 7 brush machine	$ 21, 500.00
UL equipment package	400.00
Select-A-Cycle option	606.00
Coin Box (Tokens and coins)	795.00
Token Supply (1,000)	189.00
RYKO Rinse-Off (5 gal.)	62.50
RYKO detergent (5 gal.)	35.00
Sub Total	$ 23,587.50
Maryland Sales Tax	1,179.38
Freight	700.00
Installation	900.00
Total	$ 26,366.88
E/S Water Recirculation System	$ 8,500.00

DISTRICT HEIGHTS

Robin Automotive, Inc., T/A Jiffy Lube
5917 Silver Hill Road
District Heights, Maryland 20747

RYKO R-784-2, 3 phase, 7 brush machine	$ 21,500.00
UL equipment package	400.00
Select-A-Cycle option	606.00
Coin Box (Tokens and coins)	795.00
Sub Total	$ 23,301.00
Maryland Sales Tax	1,165.05
Freight	700.00
Installation	900.00
Total RYKO Equipment	$ 26,066.05
E/S Water Recirculation System	$ 8,500.00

Please note that in consideration of your agreement to purchase more than one of our machines we have given you our most favorable price, which represents discounts of $2,400 on the machinery and $1,100 on the installation on each machine, or a total of $7,000 below retail overall.

We have also confirmed that all arrangements for the purchase are to be made by us, rather than through Jiffy Lube, International. This means that we will need to establish a payment schedule that will coincide with our obligations to RYKO, or a down payment at the time an order is placed, with the balance due on a sight draft at the time shipment, as well as a schedule covering the water system. The sight draft is a security arrangement whereby the original bill of lading, together with an invoice, is sent by RYKO's bank to our bank and the bill of lading is not released to us until the invoice is paid by our bank to RYKO's bank. Thus, we will need to deposit payment by you into our bank in time to meet the sight draft requirement. As to the water system, down payment would normally be made at the time we deliver the first equipment to the job(ie. pit cover frame and lids), with the balance due upon installation.

Since we are kind of in the midst of all of the deadlines, I have made up a table showing the various payments and due dates

involved so that we can all keep straight on the figures and where we stand. The Lanham machine is en route and we hope to off-load it Wednesday afternoon or Thursday mornig (9/29 or 9/30); the District Heights machine will be shipped, if the schedule at RYKO holds up, on October 7,1982. The table is as follows:

LANHAM	RYKO Equipment	E/S Sytem	Total
Purchase price	$26, 388.88	$ 8,500.00	$34,866.88
Down payments received	2,250.00	2,250.00	4,500.00
Balances due	$24,1T6.88	$ 6,250.00	$30,366.88
Payments due:			
9-27-82 to cover sight draft	24,116.88		
On Installation		6,250.00	$30,366.88
DISTRICT HEIGHTS			
Purchase price	$26,066.05	$ 8,500.00	$34,566.05
Down payments due:			
10-1-82	2,250.00	2,250.00	4,500.00
Balances	$23,816.05	$ 6,250.00	$30,066.05
Due on or after 10-7-82, upon notice from E/S	23,816.05		
Due upon installation		6,250.00	$30,066.05

I would appreciate it if you would sign a copy of this memorandum and return it to us for our records.

If there are any qudstions about any of the above, please call us.

Acknowledged:

Sincerely,

S Fred J. Eden, Jr.

Scott Trennor
Scott Lube, Inc.
Robin Automotive, Inc.

Fred J. Eden, Jr.
EDEN SERVICES

ps. I am enclosing a copy of a recent letter to Ray Cunningham of Jiffy Lube which is self explanatory and covers the scope of our work on the water system and the RYKO installation as well as pricing information and some figures we have developed concerning the efficiency of the water system.

No. 87-792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EDEN SERVICES, a Maryland Partnership,
FRED J. EDEN, JR., and J. ERIK EDEN,
Petitioners,

v.

RYKO MANUFACTURING CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONERS' REPLY BRIEF

As demonstrated in the brief of the Amici States, this case raises important issues concerning the Sherman Act's restrictions on the power of manufacturers to limit the resale price and distribution of their products, and the decision of the court of appeals conflicts with other rulings. Rather than address these significant questions, respondent offers primarily factual assertions.

1. Respondent essentially ignores the argument that the court of appeals stretched beyond recognition the holding in *Copperweld Corp. v. Independence Tube Corp.*, 467

U.S. 752 (1984). Ryko notes only that the court of appeals did not expressly cite *Copperweld*. Ryko Br. at 11. But the court of appeals relied entirely on *Pink Supply Corp. v. Hiebert*, 788 F.2d 1313, 1316-18 (8th Cir. 1986), in ruling that an agent lacks capacity "to engage in an antitrust conspiracy with its corporate principal." Pet. App. 11a. *Pink Supply* was based entirely on a misapplication of *Copperweld*. Thus, that distortion of *Copperweld* lies at the heart of the Eighth Circuit's holding that an agent and its principal cannot combine to violate the Sherman Act.

Without any supporting citation, respondent claims that there is a "consistently recognized rule that an agent lacks legal capacity under section 1 of the Sherman Act to conspire with its corporate principal." Ryko thus ignores this Court's decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), finding an illegal combination under the Sherman Act between a newspaper and its agent. Two other courts of appeals recently refused to recognize the "rule" claimed by Ryko. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986) (airline and its agents "not the same firm for purposes of *Copperweld*"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214 (D.C. Cir. 1986) (*Copperweld* inapplicable to moving company and its agents); *see* Pet. at 14.

Indeed, if there were a rule that agents and their principals cannot conspire under the Sherman Act, then the question decided in *Copperweld* would never have arisen. Why decide in *Copperweld* whether a parent corporation can conspire with its wholly-owned subsidiary if Ryko is correct that no agent and principal can conspire under the Sherman Act? The Eighth Circuit's holding conflicts with *Copperweld* and other lower court decisions, and this Court should address that conflict.

2. The Petition's second question presented concerns the need to clarify *Simpson v. Union Oil Co.*, 377 U.S.

13 (1964). In opposition, Ryko offers the factual argument that Eden was Ryko's "agent" and thus no resale price maintenance could have occurred.[1] But Ryko fails to distinguish other decisions—especially *Simpson*—that are contrary to the ruling below.

For example, the distributor in *Bostick Oil Co. v. Michelin Tire Co.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983), was not found to be an agent of the manufacturer, even though the national account customers were billed directly by the manufacturer, *id.* at 1212, and many shipments were sent directly to the customers, with the distributor never taking possession of the goods, *id.* at 1210. These are precisely the factors considered by the court of appeals in concluding that Eden was Ryko's agent, yet Ryko cannot explain how the program in *Bostick Oil* differed from Ryko's national account system. *See* Ryko Br. at 15, n.8.

Ironically, Ryko attempts to distinguish *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), on grounds expressly re-

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[1] According to Ryko, "[t]he conclusion that Eden functioned as an agent on national account sales is based upon *uncontroverted* facts in the record." Ryko Br. at 13 (emphasis added). But Ryko ignores the many contrary facts stated in the Petition and the brief of the Amici States—most importantly, the distributorship contract itself which was drafted by Ryko and provides that Eden is *not* "the agent or legal representative of [Ryko] for any purpose whatsoever." *See* Amicus Br. at 9-10. Those many facts—Eden's exposure to risk caused by price fluctuations, Eden's complete risk of loss on sight draft sales and partial risk of loss on purchase order sales, Eden's complete risk of damage during shipping, and Eden's warranty obligations—demonstrate that Eden was an independent entrepreneur. *Id.* at 9-12.

Ryko now claims that one sight draft sale to Jiffy Lube was not actually made on national account terms. Ryko Br. 16, n.10. In fact, Eden was required by Ryko to sell to Jiffy Lube at the national account price, *see* Pet. App. 75a, and Eden thus was forced to make this sight draft sale at the national account price, which it did.

jected by the Fifth Circuit and by General Foods itself. Thus, Ryko emphasizes that the distributor in *Greene* "owned and held title to the goods" involved. Ryko Br. at 14. General Foods argued that it could have retained title to those goods involved, but insisted that if such a formalistic device conferred immunity from the Sherman Act, then the law would "turn on meaningless technicalities." 517 F.2d at 657. The Fifth Circuit added, "We agree." *Id.* Unfortunately, both Ryko and the Eighth Circuit would permit evasion of the Sherman Act through the employment of just such meaningless technicalities. *Compare Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977) (rejecting as "formalistic line drawing" an earlier ruling that application of *per se* rule turned on whether distributor took title to goods).[2]

And Ryko never even attempts to reconcile the ruling below with *Simpson*. In purporting to apply *Simpson*, the court below—like several other courts—plainly abandoned the antitrust policy vindicated by *Simpson*. The Amici States cogently explain the resulting confusion and damage to public and private antitrust enforcement. Amicus Br. at 13-18. This Court should grant certiorari to address this important issue.

3. Ryko's argument on its exclusive territories restriction depends entirely on characterizing that restriction as a *vertical* restraint. But Ryko's arrangement with other distributors does not become vertical simply because Ryko claims to have acted only as a manufacturer.

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[2] Ryko also points out that the distributor in *Greene* stored the goods involved (coffee) prior to delivering them to the national account customer, Ryko Br. at 14, while Eden ordinarily did not store the $20,000 car wash machines made by Ryko. This distinction is due entirely to the difference between products. A commodity like coffee is routinely kept in inventory by distributors, while a big-ticket item like a car wash machine is built to order and delivered directly to the purchaser. That distinction in products cannot establish whether Eden was or was not an independent business under *Simpson*.

Ryko incontestably participates in the market at two levels—as manufacturer and as distributor—and cannot escape the horizontal nature of its exclusive territories restriction by ignoring its dual role. *See United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).[3]

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[3] At two points, Ryko fundamentally mischaracterizes the Petition. *First*, Ryko states that Eden does not challenge the "appellate finding" that Eden failed to show a " 'conscious commitment to a common scheme designed to achieve an unlawful objective.' " Ryko Br. at 17 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). The court of appeal's error on this point is the subject of the Petition's first two questions presented.

Second, Ryko states that "Eden has not even appealed from the Court of Appeals decision that the territorial arrangement is not unreasonable," and that "Eden has conceded that the territorial provision . . . was not 'the result of a distributors' cartel.' " Ryko Br. at 19. The Petition argues that Ryko's territorial restriction should be *per se* illegal as a horizontal restraint on trade and therefore is unreasonable. Because the territorial restriction was not initiated by distributors other than Ryko, it did not develop from a classic cartel structure. But because the restriction primarily protects Ryko as distributor from competition by distributors like Eden, it operates as a horizontal restraint and should be held *per se* illegal.

Finally, Ryko has included certain inflammatory remarks without citation to the record or supporting explanation. The most prominent example is the assertion that "Fred Eden, a lawyer by training, lied under oath on two occasions." Ryko Br. at 6. Even if that assertion were true, it would involve only a question of credibility already decided by a jury which ruled against Ryko on every one of the nine claims that it decided, including a finding that Ryko committed fraud.

CONCLUSION

For all of the reasons stated above and in the Petition for Certiorari, this Court should grant Eden's Petition for Certiorari.

Respectfully submitted,

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January 5, 1988

(3)

No. 87-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDEN SERVICES, FRED J. EDEN, JR., AND J. ERIK EDEN,

Petitioners,

v.

RYKO MANUFACTURING CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF MARYLAND, NEW JERSEY, PENNSYLVANIA, AND TEXAS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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October Term, 1987

EDEN SERVICES, FRED J. EDEN, JR.
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v.

RYKO MANUFACTURING CO.,
Respondent.

On Petition For A Writ Of
Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF OF MARYLAND, NEW JERSEY, PENNSYLVANIA, AND TEXAS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTION

Maryland, New Jersey, Pennsylvania, and Texas (hereinafter the "Amici States") submit this brief in support of the Petition for a Writ of Certiorari.

INTEREST OF THE AMICI STATES

The Attorneys General of the Amici States are charged by law with the duty to enforce their states' antitrust laws, as well as the federal antitrust laws. In addition, they represent their states and political subdivisions in treble damage actions under the federal antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of the natural citizens of their states.[1/]

The Amici States, in their capacity as parens patriae, play a major role in federal antitrust enforcement. Moreover, the states' own antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[2/] Therefore, the Amici States

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1/ 15 U.S.C. § 15c.

2/ See, e.g., Marin County Bd. of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P.2d 833 (1976); People v. North Avenue Furniture & Appliance, Inc., 645 P.2d 1291 (Colo. 1982); Neyens v. Roth, 326 N.W.2d 294 (Iowa 1982); Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 182 Minn. 159, 234 N.W. 453 (1931); State v. (Continued)

have a substantial interest in ensuring that federal courts apply the antitrust laws consistently with underlying Congressional policy and with this Court's past decisions.

The Amici States support the contention of Petitioners Eden Services, Fred J. Eden, Jr., and J. Erik Eden ("Eden"), that an illegal price fixing agreement exists when a manufacturer sets distributor's resale prices, but disclaims the existence of any agency relationship in its distributorship contract and places risks of loss on the distributor. Defining the relationship as principal and agent to permit price fixing, as the Eighth Circuit did, severely undercuts the per se rule against vertical price fixing. Petitioners' contention, in contrast, promotes

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Readers Digest Assoc., Inc., 81 Wash.2d 259, 501 P.2d 290 (1972) appeal dismissed, 41 U.S. 945 (1973); Grams v. Boss, 97 Wis.2d 332, 294 N.W.2d 473 (1980). See also, FLA. STAT. § 542.32 (1985); MD. COM. LAW CODE ANN. § 11-202(a)(2) (1983 Repl. Vol.); VA. CODE § 59.1-9.17 (1987).

sound antitrust policy and effective enforcement of the antitrust laws.

SUMMARY OF ARGUMENT

A resale price maintenance ("RPM") agreement between a manufacturer and an independent distributor is illegal per se. In Simpson v. Union Oil Co., 377 U.S. 13 (1964), this Court reinforced the RPM ban. Simpson prevents parties from circumventing the per se rule by merely characterizing their relationship as principal and agent.

The Eighth Circuit's Opinion in Ryko Manufacturing Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987) petition for cert. filed, 56 U.S.L.W. 3385 (U.S. Nov. 16, 1987) (No. 87-792), conflicts with both the holding and the spirit of Simpson. By erroneously characterizing the parties' relationship as principal and agent rather than as manufacturer and independent distributor, Ryko reopens the loophole in the per se rule closed by Simpson.

In addition, other circuit courts, while purporting to follow Simpson, have applied conflicting criteria to determine whether a manufacturer and a distributor are legally capable of concerted action necessary to violate section 1 of the Sherman Act, 15 U.S.C. § 1. The confusion caused by these decisions has severely curtailed the Simpson rule and undermined the ban on RPM agreements.

The Amici States are concerned that this erosion of the per se rule against resale price maintenance will have far ranging effects. In certain manufacturer/ distributor settings, vertical price fixing may become essentially per se legal. The Attorneys General will encounter difficulty in enforcing the antitrust laws to protect consumers and foster competition. This Court should, therefore, grant the Petition for a Writ of Certiorari to reaffirm Simpson.

ARGUMENT

I.

RYKO IRRECONCILABLY CONFLICTS WITH SIMPSON AND THEREBY UNDERMINES THE PER SE RULE AGAINST RESALE PRICE MAINTENANCE.

A price fixing agreement between a manufacturer and an independent distributor is per se illegal. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Since Dr. Miles, this Court has consistently applied the per se rule to vertical price fixing. See, e.g., 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

An exception to the RPM ban exists when a principal sets prices for its agent because the parties to an agency relationship are legally incapable of conspiring for purposes of section 1 of the Sherman

Act, 15 U.S.C. § 1. United States v. General Electric Co., 272 U.S. 476 (1926). Parties cannot, however, engage in resale price maintenance by merely characterizing themselves as principal and agent. In Simpson v. Union Oil Co., 377 U.S. 13 (1964), this Court forcibly closed that loophole in the RPM ban.3/

Simpson holds that resale price maintenance, achieved through a purported agency relationship, is illegal when an examination of the economic realities of the relationship, mainly the allocation of the risks of loss, show the so-called agent to be an independent entrepreneur. Id. at 20-22. This Court found that the retail dealer in Simpson had most of the "indicia of entrepreneurs" and therefore was an "independent businessman" who could agree to fix prices in violation

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3/ In Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752 (1984), this court held that a corporate parent and its wholly owned subsidiary are incapable of violating Section 1 of the Sherman Act because they possess a "complete unity of interest." Id. at 771. This Court explicitly limited its decision to activity of a parent and subsidiary. Copperweld cannot be expanded to apply to agency relationships.

of the Sherman Act. Id. at 20. As a result, this Court ruled that the oil company, which set prices through a consignment arrangement, engaged in illegal price fixing.

Ryko Manufacturing Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3385 (U.S. Nov. 16, 1987) (No. 87-792), directly conflicts with Simpson and reopens the loophole it closed. Although in Ryko the Eighth Circuit purported to follow Simpson, it recast the relationship between Ryko, a car wash manufacturer, and Eden, an independent distributor, as principal and agent. Thus, the court failed to find concerted action necessary for a violation of the Sherman Act.

Ryko cannot be reconciled with either the spirit or the holding of Simpson. First, the two decisions promote far different policies. Simpson implements the policy that the antitrust laws should be construed broadly to give maximum effect to their underlying purposes. Exemptions should be interpreted narrowly.

See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975); U.S. v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956). Consequently, the Simpson Court refused to create a consignment exemption to the RPM ban. By ensuring price competition in the marketplace, the Simpson rule benefits consumers.

The Ryko court, on the other hand, applied the antitrust laws narrowly and created a broad exemption by finding an agency relationship between Ryko and Eden. Indeed, the court indicated that price fixing in the Ryko circumstances "would be consistent with sound antitrust policy." 823 F.2d at 1222. Thus, the result in Ryko was inevitably inconsistent with Simpson.

Second, the analysis performed in Simpson was necessary only because the parties had described themselves as principal and agent to avoid the antitrust laws. 377 U.S. at 18-19. Here, however, the

agreement between Ryko and Eden, drafted by Ryko, specifically disclaims an agency relationship.[4/] This provision is a strong indication that the parties intended to remain independent.

Third, a comparison of the economic realities in Ryko with those in Simpson demonstrates Eden was an independent entrepreneur. In Simpson, as the retail price of gasoline dropped, the dealer's commission declined. Likewise, Eden's return on price-fixed National Account Program ("NAP") sales varied with market conditions. Eden's "commission" on NAP sales was the difference between Eden's wholesale cost for the machines and the fixed NAP price. If NAP prices

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4/ The Exclusive Distributorship contract between Eden and Ryko, Pet. App. D at 67a-68a provides:

> It is agreed that this agreement does not constitute the Distributor, the agent or legal representative of the Company for any purposes whatsoever. Distributor is not claiming any right or authority to assume or create any obligation or responsibility, expressed or implied, on behalf of the name of the Company of [sic] to bind Company in any manner or thing whatsoever.

dropped, Eden incurred all of the loss. 823 F.2d at 1220. Ryko bore no risk; it was paid the same amount whether the machine was sold to Eden or to a NAP customer.

The Simpson dealer also bore the risk of loss of the product following delivery, except for acts of God. 337 U.S. at 20. Similarly, Eden bore all risks of loss on sight draft transactions.[5/] On purchase order transactions, the parties shared the loss. Ryko bore the cost of its machinery, but Eden bore the loss of

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[5/] In sight draft transactions, Ryko shipped machinery to Eden who then paid for the machine through a sight draft transfer. Title and risk of loss passed to Eden. To protect itself from the risk of non-payment by the purchaser, Eden required the purchaser to pay in advance. Because the purchaser had already paid, Eden immediately passed title to the purchaser. 823 F.2d at 1219-20, 1227. Based upon Eden's requirement of advance payment, the Eighth Circuit found insufficient shifting of risk of loss to Eden. 823 F.2d at 1227. That conclusion is incorrect. The particular financing arrangement between Eden and the purchaser has no impact upon the transfer of risk of loss between Ryko and Eden, the pertinent risk for the Simpson analysis.

installation.[6/] On all transactions Eden sustained the risk of damage in transit, 823 F.2d at 1225 n.4, a risk not borne by the Simpson dealer.

In sum, Eden was more independent from Ryko than the Simpson dealer was from Union Oil. Thus, the Eighth Circuit's finding that Eden was Ryko's agent directly contravenes Simpson and Simpson's reinforcement of the per se rule.

[6/] In its analysis, the Eighth Circuit looked only at the car wash machine itself. Yet, the customer bought a fully installed, operating car wash. This included both a good (the car wash machine manufactured by Ryko) and a service (installation by Eden). Ryko fixed the price for both the good and the service on NAP sales. Ryko received its usual wholesale price (the same price it received on all purchases involving distributors) and Eden received the difference between the NAP price and the wholesale price. From this amount, Eden had to recoup all of its sales costs plus all of its costs of installation, including shipping damage repair costs. 823 F.2d at 1218-28. Even under the Eighth Circuit's narrow reading of Simpson, Eden must have been an independent businessman for the service component for which it bore all economic risks.

II.

THE COURT SHOULD RESOLVE CONFLICTING APPLICATIONS OF SIMPSON BY THE COURTS OF APPEAL.

While the Eighth Circuit approach in Ryko misapplies Simpson, the rule established by the Seventh Circuit disregards Simpson. In Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1436 (7th Cir. 1986), the Seventh Circuit, although citing Simpson, formulated its own rule that if an "agency relationship has a function other than to circumvent the rule against price fixing," the principal and agent become a single entity incapable of concerted action. Accord Illinois Corporate Travel v. American Airlines, Inc., 806 F.2d 722, 724-26 (7th Cir. 1986). No matter how strong the Simpson "indicia of entrepreneurs," Morrison would find no concerted action if the agency had a function other than price fixing.

In Simpson, Union Oil and its dealer were found to have conspired even though the consignment scheme

had at least one function other than price fixing: it minimized the dealer's investment in his inventory of gasoline.[7/] Under the Seventh Circuit's rule, however, Union Oil and Simpson would be legally incapable of concerted action. Thus, the Morrison rule cannot be reconciled with Simpson's holding.

The Seventh Circuit's rule is an unwarranted departure from the per se rule against resale price maintenance in manufacturer/distributor arrangements. Any manufacturer desiring to fix retail prices could create an "agency" with at least one function other than price fixing.[8/]

[7/] Additional functions for the consignment scheme might also be postulated. For instance, in Parrish v. Cox, 586 F.2d 9, 12 (6th Cir. 1978), the Court found that the consignment arrangement maintained quality.

[8/] Perhaps Morrison can be explained by the Seventh Circuit's antipathy to the per se rule against resale price maintenance. The Seventh Circuit still found the rationale of the per se rule "unclear," despite recognizing that, following Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court had reaffirmed the per se rule, California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980). Morrison, 797 F.2d at 1438. (Continued)

The Seventh Circuit's position is the most extreme attempt among the circuits to circumvent Simpson, but other courts have also interpreted Simpson narrowly, and have thereby limited the scope of the antitrust laws. See e.g., Hardwick v. Nu-Way Oil Co. Inc., 589 F.2d 806, 809-10 (5th Cir.), cert. denied 444 U.S. 836 (1979); Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339, 341-43 (9th Cir. 1983), cert. denied 464 U.S. 820 (1983); Pogue v. International Industries, Inc., 524 F.2d 342 (6th Cir. 1975).

Not all circuit court decisions misapply Simpson. For example, Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 627-28 (4th Cir.) cert. denied 434 U.S. 923 (1977); Greene v. General Foods Corp., 517 F.2d

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Unable to attack the rule directly, the court was inclined to create a broad exception to its application. See Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1161-62 (7th Cir. 1987) petitions for cert. filed, 56 U.S.L.W. 3322 (U.S. Oct. 14, 1987) (No. 87-610), 56 U.S.L.W. 3356 (U.S. Nov. 2, 1987) (No. 87-728).

635, 651-58 (5th Cir. 1975) cert. denied 424 U.S. 942 (1976), and Atlantic Refining Co. v. Federal Trade Commission, 344 F.2d 599 (6th Cir. 1965), follow both the rule and the spirit of Simpson. Because Ryko conflicts with Simpson, it also conflicts with those circuit court decisions following Simpson. Thus, this Court should grant the Petition to resolve the conflict among the circuits.

III.

THE RYKO DECISION HAS POTENTIALLY DETRIMENTAL EFFECTS ON ANTITRUST ENFORCEMENT.

Ryko, like Morrison, emasculates Simpson and has potentially far-reaching effects on antitrust enforcement. Many manufacturers could characterize their arrangements with distributors as an agency for antitrust purposes under Ryko, or as serving a function other than price fixing under Morrison. For example, merely by requiring purchase orders to be in the manufacturer's name rather than the distributor's

name and by shipping directly to the purchaser, the manufacturer would likely satisfy the Ryko criteria and could fix prices with impunity. The same manufacturer would satisfy the Morrison test by establishing some function other than resale price maintenance, for example quality control. See supra note 7.

Vertical price fixing would become "lawful per se" in divers situations, see Illinois Corporate Travel, 806 F.2d at 729, a result which would severely hamper the Attorneys General in prosecuting resale price maintenance cases. Only in the most egregious cases could a jury be convinced that no "agency" existed for antitrust purposes.

In light of the uncertainty caused by the conflicting court decisions, this Court should reaffirm Simpson. The basic reasoning of Simpson remains sound. The courts should still examine, case by case, whether distributors possess the "indicia of

entrepreneurs." 377 U.S. at 20. If so, the manufacturer and distributor are capable of concerted action in restraint of trade. This Court should clarify and expand the Simpson indicia, however, to ensure the vitality of the per se rule.[9/]

Unless this Court corrects decisions like Ryko and Morrison, manufacturers will continue to circumvent the per se rule against price fixing simply by restructuring their transactions. This Court should not now condone a major exception to its long-held rule that vertical price fixing is per se illegal. This Court should grant the Petition for a Writ of Certiorari.

9/ Moreover, this significant shift away from the per se rule against price fixing is occurring without any action by Congress. Although the courts originally formed the per se rule, the rule has become entrenched in the law. Any diminution of the rule should, therefore, come from Congress.

IV.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and review the first question presented by Petitioners.

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Respectfully submitted,

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